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Few notions have received such unequal and superficial treatment in legal doctrine as the condominium.[1] Though studies on the condominium date back to the late seventeenth century, they mainly focused on historical cases related to the Holy Roman Empire or the Swiss Cantons and drew heavily upon the private law analogy of joint ownership and undivided property.[2] However, beginning in the second half of the nineteenth century, condominium began to inspire specialists of international law, notably thanks to the establishment of condominia over the Island of the Conference between France and Spain (1856) and over the Duchies of Schleswig and Holstein between Prussia and Austria-Hungary (1865).[3] However, international lawyers up to the present day too often simply accommodate such public law notions as sovereignty and jurisdiction with the domestic theory of common property, trying to locate each state's rights and powers over condominial territory.[4] This article attempts to show that this attitude has led to a deadlock. It is the theory of a partial international condominial community that serves to insert the notion of condominium into a general theory of public international law and to distinguish it from related situations.

Condominium is not the product of doctrinal thinking. The word was used as such in the Gastein Convention of 1865 on the Duchies of Schleswig and Holstein, and though there is no mention of it in the conventions relating, for example, to the New Hebrides or the Sudan, it has been widely resorted to in diplomatic correspondence.[5] Although domestic tribunals were often confronted with private disputes arising from condominial regimes, they were very reluctant to use the term. Belgian courts never mentioned it with regard to Moresnet. At the international level, the International Court of Justice (I.C.J.) used the term "condominium" to qualify the legal status of a bay in 1992. Whereas, the Central-American Court of Justice had dispensed with it seventy-five years

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1. *See* ABDALLA ALI EL-ERIAN, CONDOMINIUM AND RELATED SITUATIONS IN INTERNATIONAL LAW 10-14, 23 (University Microfilms Int'l, Ann Arbor, MI 1977) (Cairo, Fouad I University Press 1952).

2. ALAIN CORET, LE CONDOMINIUM 1 (Paris, LGDJ, 1960); Daniel P. O'Connell, *The Condominium of the New Hebrides*, 1968/69, BRIT. Y.B. INT'L L. 71, 77 (1970).

3. *See* EL-ERIAN, *supra* note 1, at 11. According to Abdalla El-Erian, international law textbooks written during the nineteenth century, with the exception of those by A.G. Heffter and Alphonse Rivier, do not discuss condominium. *See id.* at 10, 12 (citing A.G. HEFFTER, LE DROIT INTERNATIONAL DE L'EUROPE 154 (trans. J. Bergson, 4th ed. 1883); ALPHONSE RIVIER, 1 PRINCIPES DU DROIT DES GENS 162 (1896)).

4. *See id.* at 4-5.

5. *See* CORET, *supra* note 2, at 2-3.

before.[6] Given the lack of interest in condominium and its equivocal and conflicting meanings, one should not be obsessed with terminology but should turn to objective analytical tools. This demarche is particularly relevant when it comes to a concrete analysis of condominia, their day-to-day administration, and their relations to the international legal order.

I. THE NOTION OF THE CONDOMINIUM

A. The Private Law Approach

1. Condominia in Domestic Legal Systems

The use of the term "condominium" in international law was mostly due to the influence of Roman, civil, and common law.[7] One can certainly draw an analogy between the private law institution of common property, or undivided joint property, and condominium.[8] Whether such an analogy is justifiable is considered below.

a. Roman Law

It is well established that those scholars who first wrote on international law had to rely heavily on the rules of Roman law,[9] especially when it came to dealing with territorial matters. Although the term "condominium" itself was unknown to the Roman legal system, it seems that it is the *Communio pro Indivisio*, or undivided joint property,[10] as described by Gaius, Justinian, and Papinius that first inspired theories on condominium.[11] Indeed, *dominium* usually meant full ownership in Roman law.[12] Justinian classifies categories of *res* in the following matter: (1) *res*

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6. *See* EL-ERIAN, *supra* note 1, at 201.
7. Peter Schneider, *Condominium*, 10 ENCYCLOPAEDIA PUB. INT'L L. 58, 58 (1989).
8. *See* EL-ERIAN, *supra* note 1, at 4.
9. *See id.* at 25.
10. *See id.* at 71.
11. *See id.* at 72-73 & nn.5-7 (citing WILLIAM ALEXANDER HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE EMBODYING THE INSTITUTES OF GAIUS AND THE INSTITUTES OF JUSTINIAN (trans. John Ashton Cross, 4th ed. 1903)). For a discussion of Roman Law in general, see W.W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW 58-119 (1912); MAX RADIN, HANDBOOK OF ROMAN LAW (1927).
12. *See* EL-ERIAN, *supra* note 1, at 74. The first branch of Roman private law relates to persons. *See id.* at 72. There, the term *dominium* is used to describe the power of the *paterfamilias* over his slave, together with *manus* (the power over his wife) and *potestas* (the power over his children). *See id.* The exercise of *dominium* implied for the *pater familias* the power of life and

communes, things open to everyone, like the air; (2) *res publicae*, public property of the state; (3) *res universitatis*, property of a corporation; (4) *res nullius*, property of no one, and (5) *communio*, where property is common to joint owners.[13] In the last case, two or more owners own the whole thing in common, with an undivided part of it belonging to each one of them separately.[14] It was first considered that each of the joint owners would exercise *potestas* over the property held in common, with the power to dispose of it in the case of a thing or to free a slave possessed in common.[15] From the first century B.C. onwards, it has been only a partial, independent right of ownership that was exercised by each owner over the undivided property.[16] In practice, a distinction was made between two cases.[17] First, each co-owner could freely dispose of his undivided part of the joint property, or mortgage it, since legal acts that only affected his share could be performed without difficulty.[18] However, in the second case, when the act affected the whole thing, such as the decision to free a slave, each co-owner had to give his consent for the act to be validly performed.[19] In the case of a slave, specifically, Justinian was the first to consider that masters who owned a slave in common were obliged to sell their shares in the slave to any one of the owners who wanted to free the slave.[20]

It was the rules of *actio communi dividundo*[21] that made the partition of a thing held in common possible, with the effect that the joint property was divided among the owners, and that any excess of profit could be recovered by a co-owner at disadvantage.[22] When division was not

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death in general, and in particular, the right to alienate his sons and slaves. *See id.* at 73. The second part of Roman law relates to things. *See id.* at 72. In Roman law, rights are classified as *res incorporales*, while the things to which these rights apply are considered *res corporales*. *See id.* at 73. However, to the extent that the difference between an object and the right of ownership of it is usually not made clear in the Roman law literature, it could be considered that the rules of an acquisition of *res corporales* are, in fact, to be applied to the acquisition of the right of ownership of the thing itself, that is, of *dominium*, whether by *lege* (by the effect of law), *adjudicatione* (by a judicial sentence) or *praescriptione* (by the operation of time) under the *jus civile*, or by *occupatio* (occupation), *accession* (natural increase), or *traditio* (transfer either *inter vivos* or by testament or succession) under the *jus gentium*. *See id.* at 73 & n.7.

13. *See id.* at 74-75.
14. *See id.* at 75.
15. *See id.*
16. *See id.*
17. *See id.* at 75-76.
18. *See id.* at 76.
19. *See id.*
20. *See id.*
21. *See id.* at 77.
22. *See id.* at 77-78.

possible, as in the case of "a slave or a mule," the proceeds following the sale of the property were divided instead, with a right to compensation when the division was unequal.[23]

b. Civil Law

In French civil law, Article 815 of the Civil Code speaks of the state of *indivision*, particularly when the same thing is bequeathed to several heirs.[24] The theory of condominium in French law was greatly inspired by the Roman jurists.[25] Hence, each of the two co-owners is considered as possessing in abstract one-half of every atom of the thing and is entitled to perform legal acts not in contradiction with this status.[26]

In German law, joint property is known as *gesammte Hand* and corresponds to the French legal notion of *copropriété en main commune*, according to which the joint owners gather into one single entity to which the right to administer and alienate the property belongs.[27] Two other forms of copropriety (*Miteigentum*) are known in German law.[28] The first is the *Gemeinschaft zur Gesammten Hand*, which describes the community of goods in a marriage settlement, or the common ownership of a partnership.[29] The other is the *Gemeinschaft nach Bruchteilen*, where each of the co-owners is entitled to alienate his undivided share in the *Gemeinschaft* without having to secure the agreement of the other

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23. *Id.* at 78. As aptly noted by El-Erian:

> The legal nature of the right of the co-owner and of the relation between him and the other owners is controverted. Does each owner hold dominium of the whole limited by the concurrence of others, as was the rule in ancient Roman law? And if this was no longer valid, does he own only his own undivided part, or a potential physical part not yet determined? Or is his right not ownership at all, but an analogous right? All these opinions and others were held, as no text settled the matter.

Id. at 78 n.17.

24. *See id.* at 79.

25. *See id.*

26. *See id.* Most of the Civil Codes that were influenced by the Code Napoléon embody Roman and French jurisprudence. *See id.* at 80. The Civil Code of Nicaragua was resorted to by an international tribunal to settle a dispute regarding the legal status of the Gulf of Fonseca. *See id.*; *infra* text accompanying notes 176-94. Article 1698 of this Code provides that "'[n]one of the Coparceners may make any change in the thing held in common, even though such change would operate to the advantage of all, in the absence of their consent thereto.'" *Id.*

27. *See* EL-ERIAN, *supra* note 1, at 81.

28. *See id.* at 82.

29. *See id.*

owners.[30] Note that this consent is needed in the *Gemeinschaft zur Gesammten Hand*.[31]

c. Common Law

English law distinguishes between a "joint tenancy" and a "tenancy in common."[32] The former includes a right of survivorship while the latter does not.[33] An estate held in jointure has a fourfold unity.[34] First is a unity of interest where one of the joint tenants cannot be a tenant for life while the other is a tenant for only a certain number of years, and where one cannot be a tenant in fee, while the other is a tenant in tail.[35] Second is a unity of title where the estate of joint tenants is established by one and the same act.[36] Third is the unity of time, where the estate must be vested for one and the same period.[37] Fourth is the unity of possession where joint tenants are said to be "seized 'per my and per tout,' by the one half or moiety and by all, that is, they each of them have the entire possession, as well as every parcel, as of the whole."[38] Each joint tenant possesses an undivided moiety of the whole, rather than the whole of an undivided moiety.[39]

Joint tenants can put an end to a tenancy by disuniting their shares, either by dividing the property or by holding it in severalty.[40] When they do so, the right of survivorship no longer exists.[41] Unanimous consent was required under common law, but by statute of Henry VIII, one joint tenant could ask for the division of lands by a writ of partition.[42]

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30. *See id.*
31. *See id.*
32. *Id.*
33. *See id.* If real property was bequeathed by *A* to *B* and *C* under a joint tenancy, *C* remained the sole owner if *B* died, since *B*'s title to the property could not pass on to his heirs. *See id.* On the other hand, in a tenancy in common, each tenant could dispose of his undivided share in the property and bequeath it to his heirs, whether or not his will contained a provision to that effect. *See id.* at 82-83.
34. *See id.* at 83.
35. *See id.*
36. *See id.*
37. *See id.*
38. *Id.*
39. *See id.*
40. *See id.* at 84.
41. *See id.*
42. *Id.* Under common law, there are two additional types of joint property: coparcenary estates and estate in entirety, *see id.*, the subtleties of which need not be analyzed herein.

Joint tenancies have been replaced by tenancies in common by the statutes of various states in the United States, although both forms of tenancies still exist " 'as they have been described by Blackstone.' "[43] When a property is divisible, the tenancy may be destroyed by the tenants and divided among them by an action for partition.[44] In the opposite case, the property is sold and the proceeds are divided.[45]

2. Problems with Private Law Analogies

"The part of international law upon which private law has engrafted itself most deeply is [probably] that relating to modes of acquiring territory and territorial sovereignty."[46] It is well established that Roman law and private law in general were a great source of inspiration to the founding fathers of international law.[47] According to Hersch Lauterpacht, many argue that it would be ridiculous to assume that a state's relations with its territory are analogous to that of an individual and his property.[48] Nevertheless, there are many examples "where territory has been treated as the subject of a right external to the State."[49] Indeed, the first examples

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43. *Id.* at 85 (quoting BLACKSTONE'S COMMENTARIES ON THE LAW 343 (B.C. Gavit ed., 1941)). Nevertheless, the major difference is that a joint tenancy is created under the common law if the nature of the tenancy is not stipulated, that is, when the property is conveyed "in fee simple," while the opposite rule usually prevails in the United States. *Id.* at 86.

44. *See id.* at 86.

45. *See id.*

46. *Id.* at 25.

47. *See id.* Indeed, Grotius, in his *De Jure Belli ac Pacis*, uses the Roman notion of property in his theory of "public domain" and "eminent domain." *Id.* at 25-26 (citing HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, IN QUIBUS IUS NATURAE ET GENTIUM, ITEM JURIS PULBICI PRAECIPUA EXPLICANTUR 219, 262, 264 (trans. F.W. Kelsey et al., Carnegie Inst. 1925)). Pufendorf, writing on the right of the state in its territory, was inspired by such rules on private ownership as existed in Roman law. *See id.* at 26 (citing SAMUEL PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 23, 57 (trans. William Abbott Oldfather 1931)). Vattel discussed "res communes" and "res universitatis" in Roman law to introduce *dominium eminens*, which is the right of the "supreme power over all parts of the territory belonging to the nation." *Id.* at 27 (citing EMER DE VATTEL, LE DROIT DES GENS, OU, PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 94-96 (1916)).

48. Hersch Lauterpacht, *Règles générales du droit de la paix*, 62 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.], IV, § 99, at 318-19 (1937). "Beaucoup jugent . . . absurde d'essayer de mouler le problème, en partie moderne, de la souveraineté territoriale sur la vieille conception patrimoniale et de considérer que les rapports existant entre l'Etat et son territoire sont de même nature que ceux d'un individu avec sa terre ou tout autre bien lui appartenant." *Id.*

49. "où le territoire a été traité comme faisant l'objet d'un droit extérieur à l'Etat." *Id.* In his leading book on the relations between private and international law, Lauterpacht wrote that "[i]t ha[d] become a custom with publicists . . . to base their argument on the assertion that the opinion

of joint ownership over a territory heavily draw upon a patrimonial notion of property. The condominia created during the Holy Roman Empire met the requirements of feudal and inheritance law, for example, Prussia and Lippe's common suzerainty over the city of Lippstadt, the condominium between Hesse and Baden over Kürndorf, and the *Kommunion* of Unterharz.[50] Many of these entities existed under the feudal system when the difference between private law and public law was somewhat blurred; whether they can be considered international condominia is controversial and doubtful.[51] Moreover, works on condominium as a term of international law date back to the seventeenth century, when sovereignty and ownership were still mixed. In 1682, Fromann wrote that " '[c]ondominium territorii est Condominium, seu jus duobus vel pluribus, immediate Imperio Romano Germanico subjectis, in districtu aliquo cum Superioritate competens, quo is curom proprius est, propartibus indivisis;'[52] the notion of a condominium is, however, essentially grasped with the private law rules of succession.[53] One knows that the Positivists rejected rules of international law that did not expressly or impliedly stem from the will of states, in a treaty or a customary rule.[54] Therefore, they concluded that private law could not be a source of international law.[55]

Abdalla Ali El-Erian considers that Article 38(3) of the Statute of the Permanent Court of International Justice (P.C.I.J.), and more recently,

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with which they happen to disagree is nothing else than a misleading analogy to a conception of private law." H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW, at vii (1927).

50. *See* EL-ERIAN, *supra* note 1, at 90; Schneider, *supra* note 7, at 58. As explained by Kirchenheim in his article on *Kondominat*: "In earlier times, the reasons [for the establishment of a condominium rested] especially in the feudal law; reigning families wished to keep a common estate (possession). For this reason, there were many condominia in the old German empire, which disappeared for the most part in the 19th century. . . . Also for centuries in Switzerland several cantons jointly ruled single areas, which by no means belonged to the ones which were administered the best." Kirchenheim, *Kondominat, in* WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 655 (Karl Strupp ed., 1924).

51. *See* EL-ERIAN, *supra* note 1, at 91.

52. CORET, *supra* note 2, at 1 (quoting JOHANN ANDREAS FROMANN, TRACTATIO DE CONDOMINIO TERRITORII 9 (Tübingen 1682)).

53. *See id.* "*Maevius habens territorium moritur, reliquens ex utroque praemortuo filio, nepotes numero pares: qui ipsi utique condominium acquale vel succedendo acquirunt . . . .*" *Id.* (quoting FROMANN, *supra* note 52, at 16). In 1719, G. Wagner wrote *De condominio territorii dissertatio. See id.* In 1776, K. Hoffmann wrote *De condominio*, both using the same analytical tools as Fromann. K. HOFFMANN, DE CONDOMINIO (1776).

54. EL-ERIAN, *supra* note 1, at 29-30.

55. *See id.* at 29.

Article 38(1)(c) of the Statute of the I.C.J. achieved a compromise[56] by "recognizing the existence of a third source of international law independent of, although merely supplementary to, custom or treaty."[57] Indeed, there are strong grounds to support the view that the Committee of Jurists that drafted Article 38(3) had in mind those legal rules that are recognized by the main systems of jurisprudence and would be resorted to in order to avoid a *non liquet*.[58] However, one should note that the utmost caution is needed when resorting to private law analogies, and this was constantly recalled by the I.C.J.[59] With respect to servitudes, the P.C.I.J. had stated that it was "not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law."[60] With regard to mandates, the

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56. *See id.* at 30 n.17, 31, 37.

57. *Id.* at 30. The author doubts that the purpose of Article 38 really is to list sources of international law.

58. *See id.* at 31; Humphrey Waldock, *General Course on Public International Law*, 106 R.C.A.D.I., 1962, II, at 5, 56-57 (1963).

> On one side there are jurists like Verdross, who say that Article 38 has the effect of incorporating "natural law" in international law and even claim that positive rules of international law are invalid if they conflict with natural law. [This view was also advocated by Baron Descamp of Belgium, the Chairman of the Committee of Jurists.] At the other extreme are jurists like Guggenheim and Tunkin, who maintain that paragraph (c) adds nothing to what is already covered by treaties and custom .... In between stands the majority of jurists.... They take the line that general principles recognized in national law constitute a reservoir of principles which an international judge is authorized by Article 38 to apply in an international dispute, if their application appears relevant and appropriate in the different context of inter-State relations.

Waldock, *supra*, at 55-56 (footnotes omitted). Witness the statement by Lord Phillimore of Great Britain that "[t]he general principles referred to ... were those which were accepted by all nations *in foro domestico*, such as certain principles of procedures, the principle of good faith, and the principle of *res judicata*." *Procès verbaux of the Proceedings of the Committee, June 16-July 24, 1920*, LEAGUE OF NATIONS PUB., at 336 (1920). Note that these general principles also have been considered as being inherent to *any* legal order, and that some writers have distinguished between "*principes généraux* de *droit*" and "*principes généraux* du *droit*," emphasizing that there exist principles that are peculiar to the international society, such as sovereignty.

59. *See* Waldock, *supra* note 58, at 61.

60. S.S. Wimbledon, 1923 P.C.I.J. (ser. A) No. 1, at 24 (Aug. 17); *see* North Atlantic Fisheries Case (Gr. Brit. v. U.S.), 11 R.I.A.A. 167 (Perm. Ct. Arb., Sept. 7, 1910); *Aaland Islands*, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 3 (1920).

I.C.J. said that they "had only the name in common with the several notions of mandate in national law."[61]

One wonders whether the study of condominium in public international law gains anything by comparing it with joint or common property in domestic law.[62] Indeed, common law and civil law regulate the right of ownership of each co-owner over their property, whether over the whole or over an undivided part of it, the right to dispose of their share or the impossibility of each co-owner to perform legal acts affecting the whole thing, and the various ways the right of ownership can be exercised, ceded, or abused.[63] But, this is not relevant to an analysis of the relationship between sovereign states and the territory put under their joint authority, for it is not a right of joint "ownership" to which a condominium is subject.[64] In some domestic legal systems, a co-owner is entitled to freely dispose of his or her share, whereas a state party to an agreement creating a condominium cannot dispense with the consent of the other parties, to the extent that such an international agreement usually provides for rules on joint action as regards condominial territory and not for

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61. International Status of South-West Africa, 1950 I.C.J. 128, 132 (Advisory Opinion of July 11) [hereinafter *South-West Africa*]. In his Separate Opinion, Judge McNair pointed out that it was never a question of importing into international law private law institutions " 'lock, stock and barrel,' ready-made, and fully equipped with a set of rules." *Id.* at 148 (separate opinion of Judge McNair). It was rather a question of finding in the private law institutions indications of legal policy and principles appropriate to the solution of the international problem at hand. *See id.* (separate opinion of Judge McNair). In *Barcelona Traction, Light & Power Co., Ltd. (Second Phase)* (Belg. v. Spain), 1970 I.C.J. § 50, at 1, 38 (Feb. 5), the I.C.J. was confronted with a purely municipal law problem that it had to tackle at the international level. The Court stated:

> [T]here are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

Id. On the contrary, Judge Morelli in his Separate Opinion was of the view that the Court should have relied on Spanish law, since it was that legal order that determined the vested rights of shareholders in Spain. *See id.* at 236-38 (separate opinion of Judge Morelli). In addition, Judge Tanaka thought that the Court should not have felt bound by municipal law concepts and should have recognised their relative validity according to different fields and institutions. *See id.* at 121 (separate opinion of Judge Tanaka).

62. O'Connell, *supra* note 2, at 79-80.

63. *See id.* at 80.

64. *See id.*

individual rights of ownership over such territory.[65] El-Erian clearly favors the supplementary function of private law, although recognizing that "[w]hile the legal relation is sometimes identical and as such raises no obstacle to analogy between the two systems, that is not always the case."[66] However, he draws heavily upon notions of private law in order to explain the notions of dominium and condominium. He states that "[s]ome writers . . . overlook[ed] the historical function of Dominium and the fact that the State's rights in its territory do resemble in more than one respect the right of the individual in his estate."[67] He argues as follows:

> All the factors to be considered in allowing analogy between international law and private law . . . apply to the analogy between Dominium and territorial sovereignty.
>
> While territorial sovereignty is analogous to Dominium, it is not identical with it. The state has the right to property as a corporate entity which is no more than the private law right. But its right to territorial sovereignty is different as it entitles it to what is called "sovereign rights" which it does not possess with regard to the things it possesses under private law.[68]

El-Erian explains that "[i]f Dominium in international law is territorial sovereignty for which we set as a criterion the title to the territory, then Condominium is joint sovereignty possessed by two or more states in a certain territory."[69]

One is thus led to share the view of Alain Coret, who aptly remarks:

> One of the great paradoxes with Mr. El-Erian's analysis lies in the fact that, after having largely resorted to private law, he definitely shifts to public law. Actually, this new orientation is certainly detrimental to the clarity of his demonstration. Dominium presented analogies with territorial sovereignty; it now appears that it merges together with the latter.[70]

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65. *See id.* at 79-80.
66. EL-ERIAN, *supra* note 1, at 38.
67. *Id.* at 92.
68. *Id.* at 98.
69. *Id.* at 99.
70. Ce n'est point l'un des moindres paradoxes de l'analyse de M. El[-E]rian que, parvenue à ce point à l'aide d'un recours singulièrement étendu au droit privé, elle

Coret further argues:

> The "additional" resort to private law is only relative in Mr. El Erian's analysis and, in fact, it would be more accurate to talk of a "principal" resort thereto. The reference to the other sources of international law which, incidentally, were defined in the same Article 38 [of the Statute of the P.C.I.J.], was practically obliterated.
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> . . . .
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> Actually, the notion of *dominium* went through a transmutation by entering the sphere of international law . . . . The *dominium eminens* in international law is, indeed, fundamentally different from *dominium* in private law . . . .[71] Mr. El Erian mistakenly bases himself on pure *dominium* and then arrives at *dominium eminens* without ever qualifying the term "*dominium* . . . ."
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> [This] distinction . . . can only lead the supporters of the private law theory to a deadlock:
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> — if they maintain their conception of "pure" *dominium*, they are forced to see in condominium an "islet" of private law in international law. But, as we have shown, this is precisely a conclusion which Mr. El Erian rejects; . . .
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> — if they opt for the *dominium eminens* conception, they prove that resort to private law was misleading, to the extent that *dominium eminens* is in fact territorial sovereignty, hence, a notion of pure public law.[72]

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s'oriente en conclusion résolument vers le droit public; cette nouvelle orientation ne va point d'ailleurs sans nuire à la clarté de la démonstration. Le dominium présentait des analogies avec la souveraineté territoriale; il apparaît désormais qu'il se confond avec cette dernière.

CORET, *supra* note 2, at 12.

71. *Dominium* is actual ownership by the state, while *dominium eminens* is the right that a sovereignty has repecting the property of its subjects.

72.

> [N]ous observons que la valeur "supplétive" du recours au droit privé est toute relative dans l'analyse de M. El Erian et qu'il conviendrait de parler de valeur "principale" de ce même recours; la référence aux autres sources du droit international, défini[e]s d'ailleurs par le même article 38 [of the Statute of the P.C.I.J.], a été pratiquement oubliée.
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> . . . .
>
> En vérité, c'est une transmutation que la notion de dominium a subie en pénétrant dans la sphère du droit international . . . . Le *dominium eminens* du droit international est, en effet, fondamentalement différent du dominium du droit

Hence, one is left with the view that private law is unable to tackle the notion of condominium. First, it cannot give a satisfactory classification of the various types of condominia and distinguish them from related situations, such as *coimperia*, or protectorates, since this involves concepts of public international law.[73] Secondly, the private law approach restricts the analysis to the territorial aspect of condominium and neglects problems of personal jurisdiction, public services, international responsibility, and so forth.[74] All this obviously calls for the use of international law to define the concept of condominium.

B. The International Law Approach

1. Loopholes of a State-Centered Analysis

Legal doctrine is far from being in agreement when it comes to condominium. Actually, there seem to be as many definitions as there are authors writing about it.[75] However, this confusion should not debar us from tackling the problem, since stating that "the concept of condominium is unstable and incongruous, and that each regime of joint supremacy is *sui generis*"[76] is probably the best way to avoid any serious analysis. Nevertheless, one must admit that one is faced with much variety when surveying some of the definitions that have been proposed.[77] According

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> privé . . . . L'erreur de M. El[-E]rian est de partir du dominium pur pour déboucher ensuite sur le *dominium eminens* en conservant toujours le terme dominium sans épithète . . . .
>
> [Cette] distinction . . . enferme véritablement dans une impasse les partisans de la théorie privatiste:
>
> — s'ils maintiennent leur conception du dominium "pur", ils sont dans l'obligation de voir dans le condominium un "îlot" à base de droit privé, en droit international; mais c'est précisément une conclusion à laquelle, comme nous l'avons montré, ne se rallie pas M. El[-E]rian; . . .
>
> — s'ils optent pour la conception du *dominium eminens*, ils administrent la preuve que le recours au droit privé était illusoire, dans la mesure où le *dominium eminens* est en définitive la souveraineté territoriale, en d'autres termes, une notion de pur droit public.

CORET, *supra* note 2, at 15-17 (footnote added).

73. *See id.* at 18-19
74. *See id.* at 19-20.
75. *See* EL-ERIAN, *supra* note 1, at 14-17.
76. O'Connell, *supra* note 2, at 81.
77. *See* CORET, *supra* note 2, at 37.

to Lauterpacht, a territory subject to a condominium is clearly under a division of sovereignty, or joint sovereignty, or both.[78] For Arrigo Cavaglieri, there are many examples where delineating a border would have caused so many problems that it was impossible for the interested states to reach agreement.[79] Under such circumstances, the territory was put *pro indivisio* under the contesting powers' joint authority.[80] And Lassa Oppenheim believes that a condominium is a "piece of territory consisting of land or water . . . under the *joint tenancy* of two or more States, [with] these several States exercising sovereignty conjointly over it, and over the individuals living thereon."[81] Fauchille argues that one can find cases of joint ownership, *condominium* or *co-imperium*, other than international servitudes, where two sovereignties jointly exercised authority over the same territory.[82] For Max Sørensen, "some territories have been subject to a division of authority between two or more states, [and] the most frequent form of this kind of divided authority over the same territory is termed 'condominium' or 'coimperium.' "[83] Finally, for Marcel Sibert, there is a condominium when two or more states together exercise joint sovereignty on the same territory, and such sovereignties mutually limit their activities, at least in principle, on the grounds of the legal equality.[84] In the

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78. *See* Lauterpacht, *supra* note 48, at 322.

> Un territoire sous condominium constitue un exemple clair soit de division de souveraineté, soit d'exercice en commun de la souveraineté sur un territoire donné, ou encore des deux modalités à la fois. C'est la négation de l'indivisibilité de la souveraineté territoriale.

Id.

79. *See* Arrigo Cavaglieri, *Règles genérales du droit de la paix*, 26 R.C.A.D.I., I, at 315, 388 (1929). "Il se peut que l'établissement de la frontière sur certains points présente de telles difficultés qu'il soit impossible aux Etats intéressés d'arriver à un accord." *Id.*

80. *See id.* "Tant que cet accord n'est pas possible, on soumet le territoire *pro indivisio* à l'autorité commune des Puissances contestantes, qui y organisent une administration commune. Il y a de nombreux exemples historiques de ce *condominium* . . . ." *Id.*

81. 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 171, at 409 (H. Lauterpacht ed., 7th ed. 1953). Note that the writer mixes into his definition the private law concept of joint tenancy and the public law notion of sovereignty, which he rightly does not limit to territory.

82. 1 PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 684 (1922). "À côté des servitudes internationales on rencontre des cas de co-propriété, de *condominium* ou de *co-imperium*, qui font que deux souverainetés s'exerceront d'une manière indivise sur un même territoire." *Id.*

83. MAX SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 317 (1968).

84. *See* 1 MARCEL SIBERT, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 388 (1951).

> [I]l y a condominium quand deux ou plusieurs Etats exercent, ensemble, sur un

nineteenth century, A.G. Heffter noted that two states could also exercise divided or undivided sovereignty over a foreign territory (condominium),[85] while Alphonse Rivier noted that a territory or a portion thereof, whether land or water, could belong *pro indivisio* to two or more states.[86]

One immediately has to admit how confusing these various definitions are. By taking sovereignty as a starting point, they all try to accommodate it with the special nature of a condominium. But whichever definition of sovereignty one is ready to accept, it is in fact the idea of sovereignty itself, as we shall see, that is ill-suited to characterize a condominium.[87]

In the classical view of Bodin, Vattel, and later, Jellinek, sovereignty was the ultimate authority, the *suprema potestas* or *Kompetenz Kompetenz*.[88] In reaction to such an extremist view, which leaves each state to determine its own competence and which necessarily implies the negation of international law,[89] some authors have tried to tackle

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même territoire soumis à leur commune souveraineté, la série des compétences étatiques: dans l'exercice de leur activité les souverainetés se limitent mutuellement mais, du moins et en principe, en vertu de l'égalité juridique des Etats, doivent-elles le faire sur la base de la stricte identité des droits.

Id.

85. *See* HEFFTER, *supra* note 3, at 141. "[D]eux Etats . . . [qui] peuvent encore exercer la souveraineté divise ou indivise d'un territoire étranger (condominium)." *Id.*

86. RIVIER, *supra* note 3, at 162. "Un territoire, ou une portion de territoire, terre ou eau, peut appartenir, par indivis, à deux ou plusieurs Etats." *Id.*

87. *See* EL-ERIAN, *supra* note 1, at 53.

88. *See* CORET, *supra* note 2, at 27; EL-ERIAN, *supra* note 1, at 52 & n.64.

89. *See* 1 GEORGES SCELLE, PRÉCIS DU DROIT DES GENS 7, 13-14 (1932).

> La souveraineté est une notion d'ordre public qui implique le pouvoir pour un individu de faire tout ce qu'il veut et, par conséquent, d'imposer sa volonté à tous les autres individus. Or, ce pouvoir absolu n'existe pas en fait dans une société . . . .
>
> Tout sujet de droit qui se prétend souverain s'insurge immédiatement contre le Droit et le nie.
>
> [Sovereignty is a notion of public order which, for an individual, implies the power to do whatever he wants and, consequently, to impose his will on all other individuals. However, this power does not exist in the facts in society . . . .
>
> Any subject of law who pretends to be sovereign immediately tramples on the law and negates it.]

Id. at 13. Remember that Duguit sought to get rid of sovereignty itself because it implied for him unlimited will and power. *See* EL-ERIAN, *supra* note 1, at 58 (citing L. Duguit, *The Law and the State*, 31 HARV. L. REV. 1 (trans. F.J. deSloovere, 1917)). Duguit states that any power is subject to law and circumscribed by its purpose. *See id.*

sovereignty differently, by emphasizing that sovereignty has to be inserted into a general theory of international law,[90] or with the notion of *competence* as attributed to states by international law itself.[91] Hence, sovereignty becomes a formal legal concept that merely postulates and legitimizes legal powers and indeed can vary from time to time.[92] Those competences are thus attributes of sovereignty, while sovereignty so defined is not synonymous with supreme authority or with a power outside the law.[93] It only describes the content of a competence.[94] It would be equivalent to "plénitude de competence [fullness of competence]."[95] Following the works of Ernst Radnitzky[96] and Charles Rousseau,[97] one usually classifies competences as territorial, personal, or governmental ("*compétence relative aux services publics*").[98]

None of these approaches gives a clear account of what a condominium is. If one takes the classical view of sovereignty as a starting point, one immediately has to point out that there are two distinct sovereignties that have joint authority (but state sovereignty by definition excludes any other sovereignty on the same territory), or there is a joint sovereignty that cannot be exercised by an entity other than a state.[99] All the quotations above reveal this dilemma. How could states, according to Sibert, exercise *joint* sovereignty over a territory and at the same time *limit* the exercise of their respective sovereign rights? How could a condominium, for Lauterpacht, be at the same time an example of a

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90. *See* Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 207 (1944). "A State's legal authority may be said to be 'supreme' in so far as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law . . . ." *Id.* at 208.

91. *See* EL-ERIAN, *supra* note 1, at 58 (citing SCELLE, *supra* note 89, at 13).

92. Those competencies are thus neither absolute nor unlimited: they are defined by the international legal order according to the evolution of the international community.

93. Maurice Bourquin, *Règles générales du droit international de la paix*, 35 R.C.A.D.I., I, at 5, 117 (1931). "Elle [sovereignty] n'est synonyme ni d'instance *suprême*, ni de pouvoir échappant au droit." *Id.*

94. *See id.*

95. *Id.*

96. *See* Ernst Radnitzky, *Die rechtliche Natur des Staatsgebietes*, 20 ARCHIV FÜR ÖFFENTLICHES RECHT 313-55 (1905).

97. *See* CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 95-211 (3rd ed. 1965).

98. *Id.* at 98 (*personelle*), 154-211 (*territoriale*), 99-100 (*aux services*).

99. *See* HUBERT BENOIST, LE CONDOMINIUM DES NOUVELLES HÉBRIDES ET LA SOCIÉTÉ MÉLANÉSIENNE 4 (1972). "Ou bien il s'agit de deux souverainetés distinctes exercées en commun mais la souveraineté étatique exclut précisément tout autre souveraineté dans son territoire d'exercice, ou bien il s'agit d'une souveraineté commune, mais il n'est pas concevable qu'elle soit exercée par une entité autre qu'un Etat." *Id.*

division of sovereignty and of joint sovereignty? Some views blatantly contradict each other, for condominium sometimes means division of sovereignty (Sørensen), sometimes undivided sovereignty (Fauchille, Cavaglieri, and Rivier), and sometimes even both (Heffter).[100]

Furthermore, there is considerable confusion as to the use of "sovereignty," "jurisdiction," "government," "*puissance publique*," "competence," "territorial supremacy,"[101] and as to the lack of distinction between the exercise of sovereign rights and the enjoyment thereof (a famous private law dichotomy which, as we shall see, is of pivotal importance when it comes to distinguishing, for example, condominium from coimperium). Still, one might try to defend the sovereignty-oriented concept by stating that states forming a condominium merely assert their

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100. Also witness the confusion of Hildebrando Accioly:

> En principe, on ne peut admettre la coexistence de deux . . . souverainetés complètes sur un même territoire.
>
> . . . [P]ourtant, . . . l'on connaît des cas d'exercice conjoint de la juridiction, par deux ou plusieurs Etats, sur un même territoire. . . . [I]l n'y a pas, en pareil cas, à proprement parler, co-existence de deux souverainetés, mais seulement partage d'attributions de la souveraineté entre deux ou plusieurs puissances distinctes, ou l'exercice de la compétence de chacune à des moments différents.
>
> [In principle, one cannot admit the co-existence of two complete sovereignties on just one territory.
>
> . . . However, . . . there are examples of joint exercise of jurisdiction by one or several States on the same territory. . . . Nevertheless, this is not a genuine case of a co-existence of two sovereignties, but only a case of a sharing of the attributes of sovereignty between two or several distinct powers, or a case of the exercise of each power's jurisdiction at different times.]

1 HILDEBRANDO ACCIOLY, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 257 (1940). Thus, for Accioly, there would be one sovereignty whose attributes are partitioned and exercised at different times and in respect of different matters. But this definition merely substitutes sovereignty for jurisdiction, confuses separate jurisdiction with joint jurisdiction, and reduces sovereignty to an aggregation of its attributes. In *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 831, 838 (Perm. Ct. Arb. Apr. 1928), Arbitrator Max Huber stated as follows:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other State*, the functions of a State. . . . The special cases of the composite State, of *collective* sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated.

Id. (emphasis added).

101. *See* EL-ERIAN, *supra* note 1, at 16-19 (discussing these terms).

own sovereignty, though the exercise of their sovereign rights is restricted and limited.[102] This view, however, completely contradicts the notion of condominium, since no state with authority over a condominium [*les Etats condominants*] could decide alone to modify the territory's status as condominium.[103] None of the states enjoy all of the attributes of sovereignty over the condominium, only the condominial community of these states does.[104]

The theory of competence also does not provide much help. Indeed, Rousseau himself rightly excludes the concept of sovereignty to explain a condominium. However, he gives a rather ambiguous definition: a condominium is defined precisely by the joint ownership [*l'indivision*

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102. *See S.S. Wimbledon*, 1923 *P.C.I.J.* (ser. A) No. 1, at 22-25 (Aug. 17).

103. *See* CORET, *supra* note 2, at 28. "Aucun des Etats condominants n'a, en effet, compétence pour décider à lui seul et en dernier ressort de toute modification du statut du condominium . . . ." *Id.*

104. *Id.* at 30-31. "[I]l est bien certain qu'aucun des Etats condominants ne dispose à lui seul [de la jouissance] des attributs de la souveraineté dans le territoire condominial . . . [car] c'est à la seule commnunauté de ces mêmes Etats qu'appartient cette jouissance." *Id.* However, the theory of sovereignty has been applied by the Belgian Court of Cassation to the condominium of Moresnet between Belgium and Prussia. *See id.* at 38; *infra text* accompanying notes 165-70. The court stated in the motives as follows:

> "*Attendu* que le traité de Versailles . . . a proclamé la souveraineté de la Belgique sur le territoire de Moresnet neutre.
>
> *Attendu* que cet article n'opère aucun transfert de souveraineté, qu'il n'attribue pas à la Belgique un territoire nouveau mais fait simplement disparaître l'obstacle que les prétentions de l'Allemagne mettaient à l'exercice de sa pleine souveraineté . . . .
>
> *Attendu* que le titre de souveraineté de la Belgique sur cette commune ne doit pas être recherché dans le traité de Versailles qui constate uniquement la reconnaissance par l'Allemagne de cette souveraineté, mais qu'il doit être trouvé dans les traité de Vienne de 1815 . . . ."
>
> [*Considering* that the Treaty of Versailles has proclaimed Belgian sovereignty over the territory of neutral Moresnet.
>
> *Considering* that this Article does not effect any transfer of sovereignty, that it does not attribute a new territory to Belgium, but that it removes the obstacles which the claims of Germany had put in the way of the exercise of her full sovereignty;
>
> *Considering* that the Belgian title for sovereignty over this town is not to be looked for in the Treaty of Versailles, which merely takes note of the recognition by Germany of this sovereignty, but rather in the Treaty of Vienna of 1815 . . . .]

CORET, *supra* note 2, at 38-39 (quoting *Kepp et consorts*, May 22, 1925, Pasicrisie Belge, Vol. I, 1925, at 253-55). Note that the "joint sovereignty" concept is also adopted by El-Erian. EL-ERIAN, *supra* note 1, at 99-100.

territoriale] that it establishes. It is this feature that is common to the various definitions that have been proposed to exclude the idea of an *exclusivisme territorial* [single sovereignty] over the condominium.[105] But then Rousseau explains that it is the collaboration *égalitaire*, a direct exercise of *cosovereignty*, that is the essence of a condominium.[106] Actually, this theory also leads to a deadlock since people have sought to determine to what extent individual states have exercised jurisdiction over condominia, transforming the study of condominium into a study of limited territorial jurisdiction.[107]

2. The Theory of the Partial International Condominial Community

The great flaw in the state-centered analysis is the attempt to analyze how condomini *qua* states were to enjoy and exercise sovereignty, or competences, over their condominium. This approach can only lead to a deadlock for the simple reason that it is a *community of states* that enjoys

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105. *See* Charles Rousseau, *Cours de droit internaitonal public, (doctorat)*, 1948-49 LES COURS DE DROIT 107. "[P]areille analyse exclut tout appel à l'idée de souveraineté . . . . Il ne saurait du reste en aller autrement, puisque le condominium se définit précisément par l'indivision territoriale qu'il institue et c'est le trait commun des diverses définitions proposées en doctrine que de souligner l'absence de tout exclusivisme territorial . . . ." *Id.* Note that this definition does not distinguish between the relations among the condomini ("*les Etats condominants*," according to the translation by O'Connell) themselves, and the relations among the condomini and third states since there obviously exists an "*exclusivisme territorial*" *vis-à-vis* those states.

106. *See* CORET, *supra* note 2, at 44.

107. *See id.* at 45-46. "La méthode utilisée a consisté à rechercher dans quelle mesure chaque Etat 'condominant' exerçait les compétences sur le territoire soumis au condominium . . . . Dès lors, la notion de condominium perdait toute sa spécificité et ne relevait plus que d'une étude des compétences territoriales limitées . . . ." *Id.*; *see* NGUYEN QUOC DINH ET AL., DROIT INTERNATIONAL PUBLIC § 322, at 469 (5th ed. 1994) (defining condominium).

> En établissant un condominium, deux ou plusieurs Etats accaparent la totalité des fonctions étatiques sur ce territoire et vis-à-vis de l'ensemble des personnes qui s'y trouvent, et ils s'engagent à exercer les compétences étatiques de façon collégiale, en général sur une base paritaire.
>
> De ce fait, le territoire en question ne peut tomber sous la souveraineté territoriale de l'un quelconque des Etats qui le gèrent. [By establishing a condominium, two or more States monopolize the totality of the functions of a State over this territory and vis-à-vis all the persons living there, and they promise to exercise State jurisdiction together, usually on an equal basis. Hence, the territory in question cannot fall under the territorial jurisdiction of any of the States which administer it.]

Id.

those competences. The closest analogy with private law would probably be that of the German Gesammte Hand.[108] It seems that this approach is but a remnant of the classical theory that saw states as the only creators, or addressees, of rules of international law. The first illuminating contribution to understanding the nature of a condominium comes from Verdross, even though he wrote on the topic only incidentally. He first rightly explains that according to the traditional view, the *jus gentium* concerned only states.[109] However, this is just begging the question because instead of examining the teachings of international practice and asking *which* communities such practice considers subjects of international law, the traditional view makes the dogmatic assumption that only states are bound by its rules.[110] Verdross then observes that "a territory can at the same time be subject to the territorial jurisdiction of two or more states, *hence*, of a community of states."[111] Verdross had explained elsewhere the characteristics of such a community: "There also exist, however, some countries that are not under the sovereignty of a state, but of a community of states the number of which may vary. This is the case of 'condominia.' "[112] He further states that it is traditionally thought that a condominium is a territory placed under the joint authority of two or more states and thus subject to the different states' rules, which have been issued by a joint organ.[113] He contends that this hypothesis, however, confuses the notions of *joint* organs and *international* organs, which have to be

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108. *See* EL-ERIAN, *supra* note 1, at 81.

109. Alfred Verdross, *Règles générales du Droit international de la paix*, 30 R.C.A.D.I., V, at 275, 303 (1929).

110. *See id.* at 321.

> D'après la doctrine traditionnelle, il est vrai, le droit des gens ne s'adresse qu'aux Etats seuls. Mais il s'agit ici d'une simple pétition de principe. Car au lieu d'examiner la conviction de la pratique internationale en se demandant *quelles* communautés elle considère comme étant directement soumises au droit des gens, la doctrine traditionnelle débute par le dogme que seuls les Etats peuvent être obligés par ses règles.

Id.

111. "[U]n territoire peut être . . . soumis à la fois à la souveraineté territoriale de deux ou plusieurs Etats, *donc* d'une communauté d'Etats." *Id.* at 396 (emphasis added).

112. "Il existe cependant aussi des pays qui ne sont pas sous la souveraineté d'un État, mais d'une communauté d'États plus ou moins large. C'est le cas des 'condominia.' " Alfred Verdross, *Le fondement du droit international*, 16 R.C.A.D.I., I, at 251, 302 (1927).

113. *See id.* "La doctrine traditionnelle pense qu'un 'condominium' est un territoire placé sous la domination commune de deux ou de plusieurs Etats, donc qu'il est soumis à des règles de différents Etats créées par un organe commun." *Id.*

clearly distinguished.[114] "Indeed, any joint organ takes it for granted that two or more legal orders are individually able to confer a given competence to the same persons."[115] For example, the same man can be the Head of State of two states, because each one of them is *alone* competent to create this function for itself.[116] If, on the contrary, a given competence does not belong to each state, but to several states together, the states can only exercise this function with the assistance of an international organ, that is, the organ of the international *community* composed of these states.[117] Hence, "a country that is ceded to two states together does not belong to each one of them, [but] it is a territory under the jurisdiction of an *international partial community*."[118]

The use of the term *community* leads us to consider states party to the condominium as *members* of an organization created by an international agreement.[119] It should be emphasized from the outset that those member states stand in a position of legal and functional equality within the community: they have the same rights and duties, and this indeed corresponds to the underlying political context of the establishment of a condominium. This community does not act through joint organs, since a joint organ belongs to each of the member states at the same time, and the condominial territory cannot be considered a joint territory. If it were, this would mean that each state party to the condominium could consider this

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114. *See id.* "Mais cette construction confond deux notions qui doivent être distinguées nettement, savoir la notion d'organe *commun* et celle d'organe *international*." *Id.*

115. "En effet l'existence de tout organe commun suppose que deux ou plusieurs ordres juridiques sont isolément capables de conférer aux mêmes personnes une certaine compétence." *Id.*

116. *See id.* at 302-03. "Ainsi, deux Etats peuvent donner la compétence de chef d'Etat . . . au même homme, . . . parce que chacun d'eux est *seul* compétent à créer pour soi-même cette fonction." *Id.*

117. *See id.* at 303.

> Si par contre une certaine compétence n'incombe pas à chaque Etat, mais à plusieurs Etats ensemble, ils ne peuvent exercer cette fonction que par un organe international, c'est-à-dire un organe qui ne soit pas l'organe commun de ces Etats, mais l'organe de la *communauté* internationale se composant de ces Etats.

Id.

118. "Un pays cédé aux deux Etats ensemble n'est donc pas un territoire de chacun d'eux, il n'est qu'un territoire sous la compétence d'une *communauté internationale partielle*." *Id.* Note that as early as 1920, Thomas J. Lawrence had written that a territory may be held in *condominium* where "the powers of sovereignty are exercised conjointly by the governments of the States concerned; [but it does not mean] that there are two sovereigns in one territory." T.J. LAWRENCE, A HANDBOOK OF PUBLIC INTERNATIONAL LAW 54 (9th ed. 1920).

119. We shall consider later whether a customary condominium is conceivable.

territory to be its own.[120] But it is in the nature of a condominium that no state can claim for itself the enjoyment and the exercise of competences over the condominium; those organs are thus *international* in essence.[121]

Ill-suited as it was when it only dealt with states, the theory of competences is relevant when applied to the condominial community. Indeed, accepting that according to international law, the state is not the only holder of, for example, territorial or personal competences, one immediately notes that it is, in fact, the condominial community that enjoys and exercises those competences. This view helps to remove the problem of condominium from the notion of a state and from the concomitant notion of sovereignty.[122]

In Verdross's view, it is possible to link the condominium with the general theory of the international community, since the world consists of an integration of partial international communities, such as customs unions and other state compositions, into a full community.[123] He includes condominium in the concept of a "*communauté d'Etats* [community of States]," exercising state competences.[124] This view also helps exclude the territorial sovereignty of each of the condomini over the condominium, as well as that of any third state. Indeed, a partial international condominial community is meant to enjoy and exercise competences that are usually

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120. Governments themselves sometimes have had such a mistaken belief. *See infra* text accompanying notes 284-93 for the French view of French jurisdiction over the New Hebrides.

121. Note that those organs are particular organs in the sense that they constitute organs of a special international law, *i.e.*, condominial law, reflecting the "partial" character of the international condominial community. *See* O'Connell, *supra* note 2, at 83. They are either immediate or mediate. *See id.* An immediate international organ is designated by the treaty that creates the condominium and exercises the competence of the community. *See id.* The international character of the organ is not prejudiced when member states themselves nominate officials of the condonimium. *See id.* This organ is then called "*un organe international particulier immédiat à désignation indirecte*." *Id.* On the other hand, mediate international organs remain under the authority of each member state but exercise competences in the condominium on the basis of a duplication of services *See id.* As such, it is clearly conceivable that condominial law, as a particular legal system, assigns the exercise of certain competences to a member state.

122. This is a notion that is the characteristic of states. *See* Advisory Opinion No. 41, Customs Regime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41, at 37 (Sept. 5) (separate opinion of Judge Anzilotti). "Independence . . . is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* . . . by which is meant that the State has over it no other authority than that of international law." *Id.* at 51; *see* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11). "The subjects of law in any legal system are not necessarily identical in their nature . . . . [T]he Court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not . . . ." *Id.* at 178-79.

123. *See* Verdross, *supra* note 109, at 396.

124. *Id.*

vested in states according to international law.[125] The status of a condominium is thus opposable to third states, for it can "only be created by respecting the competences attributed by international law to regular members of the general international community."[126] Hence, one is led to share the definition of a condominium given by Coret: "Condominium is the status of a territory where the enjoyment and exercise of the competences . . . belong to a partial international community characterized by the juridical and functional equality of the member states; this community exercises its competences with the help of particular international organs, immediate or mediate."[127]

One last issue to resolve is the legal nature of the condominial community. Whatever definition of international personality one is ready to endorse, it must be admitted that a condominium cannot have an international legal personality distinct from that of its member states.[128] In his classic course at the Hague Academy, Manfredi Siotto-Pintor distinguished the notion of a person from that of a subject, thus completing the well-known definition previously given by Judge Anzilotti who saw in legal personality the capacity to have rights and obligations under

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125. *See* Schneider, *supra* note 7, at 59.

126. "[C]e statut n'a pu être créé que dans le respect des compétences attribuées aux membres réguliers de la communauté internationale générale par le droit des gens." CORET, *supra* note 2, at 63. Obviously, this is not the same as saying that the treaty creating a condominium is opposable to third states, a very controversial theory indeed in international law. It is probably the *situation* resulting from the treaty that is opposable. *See* PAUL REUTER, INTRODUCTION AU DROIT DES TRAITÉS § 194, at 116 (3rd ed. 1995). "[B]eaucoup de traités définissent une situation concrète et quand il s'agit d'une situation territoriale il est normal que cette situation soit opposable aux autres Etats . . . ." [Many treaties deal with a concrete situation, and when a territorial issue is a stake, it is normal for this situation to be opposable to other States.] *Id.*; *see also South-West Africa*, 1950 I.C.J. at 153 (separate opinion of Judge McNair) (stating that occassionally a group of powerful states or a large number of both great and small states, "assume a power to create by a multipartite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence").

127.

> Le condominium est le statut d'un territoire à l'égard duquel la jouissance et l'exercice des compétences reconnues aux Etats par le droit des gens, appartient à une communauté internationale partielle caractérisée par l'égalité juridique et fonctionnelle des Etats qui en sont membres, cette communauté exerçant ses compétences par l'intermédiaire d'organes internationaux particuliers, immédiats ou médiats.

CORET, *supra* note 2, at 55.

128. *See* O'Connell, *supra* note 2, at 82.

international law.[129] Verdross himself distinguishes between subjects that are active and passive, thus creating the norms that address them, from subjects that are merely passive and do not enjoy international personality.[130] It is Phillipe Cahier who drew a synthesis of the characteristics of international personality, including a purpose (*le but*), an autonomous will (*la volonté*), responsibility, powers (*les pouvoirs*), an organisation (*des organes propres*), and the capacity to contribute to the formation of rules of international law.[131] An international condominial

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129. *See* Manfredi Siotto Pintor, *Les sujets de droit international autres que les Etats*, 41 R.C.A.D.I., III, at 245, 256-57 (1932). Siotto Pintor stated that personality is "la possiblité juridique générale d'être titulaire de n'importe quel droit et de n'importe quelle obligation appartenant à un domaine juridique donné [the legal capacity to be the holder of any right and any obligation under a given legal field]." *Id.* at 279. He further argued that on the other hand, subjectivity "embrasse toutes les relations possibles entre une individualité quelle qu'elle soit et un ordre juridique [encompasses any possible relation between whichever individuality and a legal order.]" *Id.* at 278. As is made clear by Philippe Cahier:

> La personne en droit international est celle qui a une compétence très générale, ou encore la pleine capacité juridique, la possibilité de prendre part à n'importe quel rapport juridique.
>
> Le *sujet* en droit international a au contraire une compétence limitée. Il est sujet en tant que certaines règles de droit international s'adressent à lui . . . .
>
> [A person of international law has a very general competence, a full legal capacity, the ability to take part in any legal relation.
>
> A subject of international law, on the contrary, has a limited competence, it is a subject to the extent that some given international legal rules apply to it.]

PHILIPPE CAHIER, ETUDES DES ACCORDS DE SIÈGE ENTRE LES ORGANISATIONS INTERNATIONALES ET LES ETATS OÙ ELLES RÉSIDENT 38-39 (1959) (footnote omitted). Whether recognition is necessary can be left aside.

130. CORET, *supra* note 2, at 58-59; Verdross, *supra* note 109, at 307-08.

131. *See* CAHIER, *supra* note 129, at 42. As a result, a classification is possible:

> Les sujets de droit international . . . [qui] ne possède[nt] pas la totalité des caractéristiques . . . .
>
> Les personnes à capacité limitée . . . qui, bien qu'ayant les caractéristiques . . . de la personnalité morale, ont, de par leur but limité, des compétences restreintes . . . .
>
> Les personnes à pleine capacité juridique . . . qui possèdent non seulement toutes les caractéristiques . . . de la personnalité morale, mais qui, en plus, de par leur but très large, ont des compétences très générales.
>
> [Subjects of international law . . . who do not have all the characteristics.
>
> Persons with limited capacity . . . who, although they have the characteristics . . . of legal personality, have limited competencies because they have a restricted purpose.
>
> Persons with full legal capacity . . . who have not only all the characteristics

community possesses *none* of these characteristics and thus has no international personality distinct from that of its member states, for the simple reason that it is only through the condomini that the condominium has access to the international order. For example, a condominum has no treaty-making power, it cannot participate in the creation of international norms, and it cannot be held responsible for international wrongful acts. Only the condomini are the international persons who can perform these acts. As we have stated, the condominial community enjoys and exercises state competences, but under condominial law only, which is a particular international legal order. Due to the lack of international personality of the condominial community, these competences and the consequences thereof have to be taken on under general international law by the condomini themselves. Indeed, with regard to organs, it must be stressed that the paradox presented by the partial international condominial community is that although the community has its own international organs under condominial law, which issue rules for the condominial territory, it has no permanent organ under international law, and thus is deprived of any legal responsibility distinct from that of each member state.[132] Therefore, condominial community and the condominial territory are mere passive subjects of international law in the sense that they can be the addressees of international rules.[133]

These conclusions obviously call for further analysis of the relationship between the condominium and the international legal order in terms of responsibility, treaty application, and self-determination (an issue that has never been considered by legal doctrine). They also call for a clarification of the legal relations between the condominium and the

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. . . of legal personality, but who also have very general competencies as a result of their very broad purpose.]
Id. at 41-42.

132. *See* CORET, *supra* note 2, at 62.

> [L]e paradoxe de la communauté internationale partielle condominante est que, sur le plan de droit condominial, elle dispose bien de ses propres organes internationaux qui élaborent les normes destinées au territoire condominial, alors que sur le plan du droit des gens elle ne dispose d'aucun organe permanent qui lui soit propre, ce qui a pour effet de la priver de toute responsabilité juridique distincte de celle de chacun des Etats membres.

Id.

133. *See* O'Connell, *supra* note 2, at 82. "[I]t is in respect of the passive aspect of international personality that Condominial territory is juridically separate from the respective metropolitan territories. Treaties of the Condomini do not apply to the territory unless specified." *Id.*

condomini, such as the question of the juridical personality of the condominium in the domestic legal systems of the condomini.[134]

II. CONDOMINIA AND RELATED SITUATIONS

A. Condominia as Distinguished from Other Special Regimes

This section does not purport to make a study of special territorial regimes, but merely clarifies the notion of a condominium when confronted with situations that, though related, cannot be assimilated to cases of condominia. Only those situations involving two or more states, or possibly persons of international law, will be considered. It would appear that the best way to distinguish condominia from related situations is to search where sovereignty is actually vested. When sovereignty is clearly vested in one state, there is no reason why the theory of condominium should apply. This is particularly the case of a coimperium, which has sometimes been equated with a condominium. *Imperium* was initially defined as personal jurisdiction as opposed to territorial jurisdiction, then qualified as *dominium*. However, international law came to identify imperium with the exercise of competences over a state's territory and to separate sovereignty from its exercise. As such, one could probably share Coret's definition: "A coimperium is a regime in which a partial international community exercises certain competences over a portion of the territory of a third state."[135] However, one must look more closely at the kind of competences the coimperii, that is, the member states of the coimperial community, exercise and at the legal powers that remain vested in the sovereign state. As a consequence, legal doctrine has sometimes distinguished between coimperium and unequal condominium. The coimperial community does not include the state in which sovereignty over the territory is vested, but this state can still exercise sovereign rights over this territory. On the contrary, the unequal condominial community includes the *nu-souverain*, that is, the sovereign that does not exercise jurisdiction, but this sovereign renounces any exercise of competences.

These theoretical explanations become clearer with concrete cases. Indeed, one can consider that Bosnia-Herzegovina, from 1878 to 1908, was placed under the unequal condominium of Austria-Hungary and the

134. *See infra* part III.

135. "Le coimperium qualifiera donc le régime dans lequel une communauté internationale partielle exerce certaines compétences sur une portion du territoire d'un Etat tiers." CORET, *supra* note 2, at 72.

Ottoman Empire.[136] Article 25 of the Final Act of the Congress of Berlin recognized that Bosnia and Herzegovina would be "occupied and administered" by Austria-Hungary,[137] but a subsequent convention of April 21, 1879 between the latter and the Sublime Porte stated that Article 25 " 'does not prejudice the sovereign right of His Imperial Majesty the Sultan over these two provinces.' "[138] In these instances, for all practical purposes rights of jurisdiction were ceded even though in law sovereignty still belonged to the *nu souverain*.[139] On the other hand, one could take the position that a coimperium existed over the Sudan, as established by the Anglo-Egyptian convention of January 19, 1899, for sovereignty remained

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136. *See id.* at 105; 1 OPPENHEIM, *supra* note 81, § 171, at 411.

137. CORET, *supra* note 2, at 105.

138. " 'ne port[e] pas atteinte au droit de souveraineté de Sa Majesté Impériale le Sultan sur ces deux provinces.' " *Id.* at 106.

139. 1 OPPENHEIM, *supra* note 81, § 171, at 411. Actually, "[a] nominal sovereignty is not totally devoid of practical consequences." *Id.* Thus, in *Lighthouses in Crete and Samos* (Greece v. Turk.), 1937 *P.C.I.J.* (ser. A/B) No. 71, at 94 (Oct. 8), the P.C.I.J. held that, regardless of the autonomy that Turkey had given to the islands of Crete and Samos, these territories still were under Turkish sovereignty in 1913, therefore Turkey could "properly grant or renew concessions with regard to these islands." 1 OPPENHEIM, *supra* note 81, § 171, at 411; *see Lighthouses in Crete and Samos*, 1937 P.C.I.J. at 103-06. Judge Hudson in his dissenting opinion stated that "a ghost of hollow sovereignty cannot be permitted to obscure the realities of this situation." *Lighthouses in Crete and Samos*, 1937 P.C.I.J. at 127 (Hudson, J., dissenting). The question of the separation of sovereignty from its exercise and of so-called restrictions of sovereignty also covers the situation of leases, concessions, military bases, and so-called state servitudes, where the holder of sovereignty, contrary to what has sometimes been asserted, is clearly identifiable. *See* Lauterpacht, *supra* note 48, § 92, at 325 (leases); Arnold D. McNair, *So-Called State Servitudes*, 1925 BRIT. Y.B. INT'L L. 111, 111-12 (servitudes) (discussing *North Atlantic Fisheries Arbitration*, 11 R.I.A.A. at 181-82). *But see* Dutch Mining, *Supreme Court of Cologne (1914)*, 8 AM. J. INT'L L. 858 (1914).

> [C]ertains en sont arrivés à analyser ces baux comme des cessions déguisées. Mais les baux étaient et sont très loin d'être cela. Ils n'auraient pas été des cessions même si la souveraineté du 'cédant' était restée purement nominale. Mais cette souveraineté est plus que nominale, et s'exprime, dans certains cas, par la continuation de l'exercice par le 'cédant' de quelques droits juridictionnels ou, dans d'autres cas, par la reconnaissance de la nécessité de son consentement au transfert de la concession. [Some people have come to considering these leases disguised cessions. But this is far from being what the leases were, and still, are. They could not have been cessions even if the sovereignty of the 'assignor' had remained nominal. However, this sovereignty is more than nominal and, in some cases, it is expressed by the continued exercise by the 'assignor' of some rights of jurisdiction or, in other cases, by the acknowledgment of the necessity of its assent to the transfer of the concession.]

Lauterpacht, *supra* note 48, at 325. The relations of sovereignty to its attributes is a very complex question, which need not be tackled in this article.

vested in the Ottoman Empire.[140] The Convention provided for a " 'system for the administration of and for the making of laws' " in the Sudan in its preamble, stated that " 'the Egyptian flag together with the British flag shall be used throughout the Sudan,' " and stated in Article 3 that " '[t]he Supreme military and civil command in the Sudan shall be vested in . . . the "Governor-General of the Sudan," . . . appointed by Khedival Decree on the recommendation of Her Britannic Majesty.' "[141] However, it must be stressed that Egypt was not competent at that time to conclude such a treaty.[142] The Khedive's authority in Egypt and in the Sudan was restricted in the *firmans*.[143] As such, the Empire never recognized the regime established in the Sudan and was thus not part of the coimperial community, which only enjoyed a de facto existence.[144]

Condominium also has to be distinguished from cases of collective protectorate, which can be distinguished from a coimperium by the fact that the latter is usually exercised on a portion of territory, while the former concerns the whole of a territory and theoretically only affects its external relations.[145] Such was the case of Samoa. According to Moye, the Treaty of Berlin of 14 June 1889 between Germany, Great Britain, and the United States created the following situation:

> None of the powers can exercise exclusive control, and the independence of the Samoan Government, as well as the right of the natives to chose their King, [is] solemnly proclaimed . . . . But [the Treaty] contains a series of measures which make the local government completely subordinate . . . . One should [also] go a step further and admit the right of the States Signatories to interfere with the foreign affairs of the archipelago. The Treaty does not expressly say so, but the intention is quite clear.[146]

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140. *See* EL-ERIAN, *supra* note 1, at 147-48.

141. *Id.* at 163-65 (quoting 1899 Convention, 84 British & Foreign State Papers [B.F.S.P.], at 638).

142. *See id.*

143. *See id.* at 162.

144. *See id.*

145. The distinction becomes somewhat blurred when it comes to small territories such as the Free City of Dantzig.

146.

> Aucune des puissances ne peut exercer de contrôle exclusif, et l'indépendance du gouvernement samoan, le droit des naturels à se choisir leur Roi, sont solennellement proclamés . . . . Mais [le traité] édicte une série de mesures qui rendent la position du gouvernement local absolument subordonné . . . . Il faut [aussi] aller plus loin et admettre le droit d'immixtion des Etats cosignataires dans

The theory of condominium has sometimes wrongfully been applied to frontier zones jointly exploited by the neighboring states. Such is the case of the guano deposits in the Mechillones, located in the Atacama desert and jointly exploited by Chile and Bolivia. According to the 1866 Treaty of Santiago, the profits were divided in two, but the frontier was clearly delimited.

Nonstate territories submitted to collective administration are too easily taken for condominia. Such is the case of Andorra. The Valleys of Andorra in the Pyrenees were placed by the *Paréage*[147] of 1278 under the joint suzerainty of the French Count of Foix and the Spanish Bishop of Urgel.[148] These rights passed to the French Crown in 1620, and then to the French State as such.[149] The President of the French Republic merely exercises his rights on behalf of the state, contrary to the common view that sees him as Prince of Andorra. However, the rights of the Bishop of Urgel, a mere individual, never passed to Spain. In accordance with the *Paréage*, the vassals were to pay an annual tribute to the co-suzerains who in turn would nominate a *viguier* to represent them in the Valleys. In *Radio Andorre*, the Commissaire du Gouvernement Odent said:

> The Valleys of Andorra have no international status. They are not a State, even protected or vassal, nor are they a person of international law. There is no treaty or convention between France and the Valleys of Andorra, neither can there be one . . . . The Valleys are a fief, enjoying the franchises that feudal law accorded to fiefs and over which the dual suzerainty of a Spanish bishop and France is exercised . . . . Since the mitre of Urgel, the other suzerain, like the territory of Andorra, does not have any international existence, it necessarily ensues that France, and France alone, bears international responsibility for the Valleys of Andorra.[150]

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les affaires extérieures de l'archipel. Le texte du traité n'en parle pas, mais l'intention est évidente.

M. Moye, *La question des îles Samoa*, 6 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 125, 136 (1899).

147. *Paréage* is a treaty giving joint and equal rights.

148. *See* EL-ERIAN, *supra* note 1, at 89; Schneider, *supra* note 7, at 58.

149. *See* Schneider, *supra* note 7, at 58.

150.

> [L]es vallées d'Andorre n'ont pas de statut international. Elles ne constitutent pas un Etat, ne serait-ce que protégé ou vassal, ni une personne de droit international. Il n'y a pas et ne peut pas y avoir entre la France et les vallées d'Andorre de traité

Another case of administration of nonstate territory is that of mandates, trusts, and nonself-governing territories. The question posed by the allocation of sovereignty, particularly with regard to mandates, has created a great deal of disagreement among writers.[151] Five interpretations have been suggested: title in the Principal Allied and Associated Powers, title in the League of Nations, title in the Mandatory Powers, title in the League of Nations together with the Mandatory Powers, and title in the inhabitants of the Mandated territories.[152] Cases of condominium have been imagined for all of these interpretations, but in fact only the first holds, since the territories therein were held in condominium *before the establishment of the Mandates*, that is, pending the functioning of the League of Nations.[153] Indeed, according to Article 119 of the Treaty of Versailles, "Germany renounce[d] in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions."[154] In fact, "the interpretation that is gaining ground now is

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> ou de convention . . . . Les vallées d'Andorre sont un fief, jouissant des franchises que le droit féodal acordait aux fiefs, et sur lesquels s'exerce la double suzeraineté d'un évêque espagnol et de la France . . . . Et comme la mître d'[U]rgel, l'autre suzerain, n'a pas davantage que le territoire d'Andorre d'existence internationale, il s'ensuit nécessairement que la France et la France seule a la responsabilité internationale des vallées d'Andorre.

CORET, *supra* note 2, at 95-96 (quoting *Radio-Andorre*, 2 février, Trib. conflits 1950, Lebon 1950, at 652 (Fr.)). This view was also expressed in an older case, *Vives*, Cass. crim., May 12, D. 1859, D.P.I. 1859, V., 89 (Fr.). CORET, *supra* note 2, at 95. And also was expressed in a subsequent case, *Cruzel v. Massip*, Dec. 6, Trib. Perpignan 1951, 1953 Revue du Droit Public [R.D.P.], 1102 (Fr.). CORET, *supra* note 2, at 96.

151. *See* EL-ERIAN, *supra* note 1, at 112.

152. *See id.* at 112-13.

153. *See* Article 22 of the Treaty of Versailles:

> To those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them, . . . there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization . . . .
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations, . . . and that this tutelage should be exercised by them as Mandatories on behalf of the League.

Treaty of Peace, Between the Principal Allied and Associated Powers and Germany, June 28, 1919, Versailles, art. 22, 1919 Gr. Brit. T.S. No. 4 (Cmd. 153) [hereinafter Treaty of Versailles].

154. *Id.* art. 119; *see* Verdross, *supra* note 112, at 303-04. "[I]l est clair que d'après l'article 119 la souveraineté sur ces territoires a été transférée aux Puissances Principales. Celles-ci étaient

the one which, as a point of departure rejects . . . the concept of sovereignty."[155] In his Separate Opinion in *South-West Africa*, Judge McNair wrote a follows:

> [T]he mandates system (and the "corresponding principles" of the International Trusteeship System) is a new institution — a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other — a new species of international government, which does not fit into the old conception of sovereignty . . . . Sovereignty in a mandated territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state, sovereignty will revive and vest in [that] state.[156]

As one author has aptly remarked,

> [t]he question of exactly where sovereignty over a trust territory rests is being reduced to one of sterility. Irrespective of where sovereignty may rest, a practical method has now been worked out and approved by the General Assembly for the placing of former mandated territories under trusteeship; and trusteeship may be lawfully terminated under the Charter by the grant of self-government or independence.[157]

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cependant obligées par l'article 22 du Pacte de transformer ces pays en Mandats de la Société des Nations. De fait, elles ont conclu des traités avec les Etats mandataires confirmés par le Conseil de la Société des Nations . . . ." [It is clear from Article 119 that sovereignty over these territories has been transferred to the Principal Powers. However, they were bound by Article 22 of the Covenant to transform these countries into Mandates of the League of Nations. Hence, they have made treaties with the Mandatories which were confirmed by the Council of the League of Nations.] *Id.*

155. EL-ERIAN, *supra* note 1, at 113. This is especially true if one considers the Mandates as being under the sovereignty of the Mandatories or the League of Nations. *See, e.g., South-West Africa*, 1950 I.C.J. at 128; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion of June 21).

156. *South-West Africa*, 1950 I.C.J. at 150 (Separate Opinion of Judge McNair).

157. Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L L. 262, 271-72 (1948).

B. The Classification of Condominia According to Coret

1. Frontier Condominia

Contrary to what has often been asserted, condominia are not mere provisory, dangerous, territorial settlements, since most of them lasted over a century or are still in existence.[158] However, it is true that a condominium can be a convenient means of settling a territorial dispute based on conflicting claims (which shows that a condominium is one out many pacific means of dispute settlement).[159] This is particularly true of condominia that are established on a disputed frontier.

a. The Island of the Conference (Annex, Fig. 6)

The condominium over the Island of the Conference, located close to the mouth of the river Bidassoa, was established by Spain and France in the Treaty of Bayonne of 2 December 1856, which was intended to delimit the border between both countries.[160] Article 27 provides:

> The Island of Faisans [the Pheasants], also known as the Island of the Conference,[161] which evokes so many historical

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158. *See* EL-ERIAN, *supra* note 1, at 6-7; SIBERT, *supra* note 84, § 251.

> [I]l arrive que la convention des parties, dominées par les contingences politiques, détruise les exigences de la raison. Il ne manque pas de s'ensuivre des heurts et des discussions parfois aiguës: la guerre même peut surgir. Si bien que le *condominium*, situation de compromis et d'attente, ne semble pas en réalité un procédé qui soit très à recommender. [It sometimes happens that the convention between Parties dominated by political contingencies runs against reason. Then, clashes and fraught discussions necessarily follow: even war can break out. Hence condominium, which is a temporary regime of compromise, is actually not a method to be recommended].

Id. But see Lauterpacht, *supra* note 48, at 322. "[L]a doctrine classique ne pouvait admettre juridiquement le condominium que par une sorte de détour et en le considérant comme un arrangement provisoire avant dévolution finale du territoire." [The traditional view could only admit condominium within a legal framework by considering it a provisory settlement before the final attribution of the territory]. *Id.*

159. *See* EL-ERIAN, *supra* note 1, at 6-7.

160. *See* CORET, *supra* note 2, at 135.

161. One should note that there actually exist two islands, one called the Island of the Faisans, or the Island of the Conference; only over this island is the condominium established. *See* Jacques Descheemaeker, *Une frontière inconnue: les Pyrénées de l'Océan à l'Aragon*, 47/49 R.G.D.I.P.

> remembrances common to both nations, will belong jointly [*par indivis*] to France and Spain.
>
> The respective authorities of the border will consult together over the prosecution of any offence committed on this island.
>
> Both Governments will take, by common agreement, the measures appropriate to preserve this island from the looming destruction[162] and will share the costs of the works that are deemed useful to its conservation.[163]

The exercise of competences by both powers is regulated by a 1901 Convention, which will be discussed later.[164]

b. District of Moresnet (Annex, Fig. 2)

The district of Moresnet was not included in the Act of Congress of Vienna of 9 June 1815 when it came to establish a frontier between Prussia and the Netherlands.[165] These states disagreed on the construction to be given to the boundary provisions, and both claimed the district.[166] On June 26, 1816, the Treaty of Aix-la-Chapelle established the condominium of Prussia and the Netherlands on Moresnet.[167] Article 17 provides:

> "Since both commissions [of delimitation] have been unable to agree upon the way in which the small part of the canton of

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239, 249 (1940-45).

162. Indeed, the island was endangered by the quarrying of gravel.

163.

> "L'île des Faisans, connue aussi sous le nom d'île de la Conférence, à laquelle se rattachent tant de souvenirs historiques communs aux deux nations, appartiendra par indivis à la France et à l'Espagne.
>
> Les autorités respectives de la frontière s'entendront pour la répression de tout délit qui serait commis sur le sol de cette île.
>
> Les deux gouvernements prendront, d'un commun accord, toutes les mesures qui leur paraîtront convenables pour préserver cette île de la destruction qui la menace, et par l'exécution, à frais communs, des travaux qu'ils jugeront utiles à sa conservation."

CORET, *supra* note 2, at 136 (quoting Treaty of Bayonne, 2 Dec. 1856, art. 27 (Spain-Fr.)).

164. *See id.*

165. *See* EL-ERIAN, *supra* note 1, at 126. Article 25 provided that "His Majesty the King of Prussia shall also possess in full property and sovereignty, the countries on the left bank of the Rhine included in the frontier . . . ," but no mention was made of Moresnet. CORET, *supra* note 2, at 147-48.

166. *See* EL-ERIAN, *supra* note 1, at 126.

167. *See id.* at 126-27.

> Aubel which . . . shall belong to Prussia would be separated . . . . This question shall be submitted to the respective governments so that they may take a decision . . . . In the meantime, the temporary border shall consist of the town of Moresnet, so that the part of this town which is located on the left-hand side of a straight line to be drawn from the point of intersection between the three cantons to the point of intersection between the three administrative divisions [*i.e.*, Ourthe, Lower Meuse and Roehr], will in any case belong to the Kingdom of Prussia; that the part on the right-hand side of a line to be drawn from the limits of the canton of Eupen, directly from the south to the north, to the same point of intersection between the three administrative districts, will also in any case belong to the Kingdom of Prussia; and, *finally, that the part of the above-mentioned town which is located between these lines, being the only one which can reasonably be contested, will be subject to a joint administration, and shall not be militarily occupied by any of the two powers.*"[168]

By the Treaty of London of 19 April 1839, the Netherlands was succeeded by Belgium as the co-partner of Prussia (later on Germany) in the Moresnet condominium.[169] The latter was ended by the Treaty of Versailles, Article 32: "Germany recognizes the full sovereignty of Belgium over the whole of the contested [this expression is incorrect, since

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168.

> "[l]es deux Commissions [of delimitation] n'ayant pu s'entendre sur la manière dont serait coupée la petite partie du canton d'Aubel qui . . . doit appartenir au royaume de Prusse. Cette difficulté sera soumise à la décision des gouvernements respectifs . . . . En attendant cette décision, la frontière provisoire sera formée par la Commune de Moresnet, de manière que la partie de cette commune, située à gauche d'une ligne droite à tirer du point de contact des trois cantons sur le point de contact des trois départements [Ourthe, Meuse inférieure, Roehr], appartiendra dans tous les cas au royaume des Pays-Bas; que celle située à droite d'une ligne à tirer des limites du canton d'Eupen directement du Sud au Nord, sur le même point de contact des trois départements appartiendra également dans tous les cas au royaume de Prusse, *et qu'enfin, la partie de cette même commune située entre ces deux lignes, comme étant la seule qui puisse être raisonnablement contestée, sera soumise à une administration commune, et ne pourra être occupée militairement par aucune des deux puissances.*"

CORET, *supra* note 2, at 148.

169. *See id.* at 148-49.

the territory was not 'contested' but condominial] territory of Moresnet (also called 'neutral Moresnet')."[170]

c. The "Frontier Streams" (Annex, Fig. 5)

The possibility of a condominium over water was expressly acknowledged by Oppenheim.[171] Under the Treaty of Aix-la-Chapelle, a condominium was established between the Netherlands and Prussia over the "frontier streams" in an area located on the right bank of the river Meuse and along the Grand Duchy of Luxembourg.[172] Article 27 of the Treaty reads as follows:

> "Unless otherwise stipulated, wherever brooks, streams, or rivers are boundaries, they will be common to both States .... There shall be no changes in the flow of the rivers, neither in the banks, and no concession or right to draw water shall be granted without the participation and consent of both governments; the same will apply to ditches, channels, paths, canals, hedges, or any other object used as a limit, *i.e.* the sovereignty over these objects will be common to both powers.
>
> ....
>
> Catch will also be common and will continue to be sold by public auction on behalf of both States."[173]

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170. *Id.* at 149 (quoting Treaty of Versailles, *supra* note 153, at art. 32).
171. *See* 1 OPPENHEIM, *supra* note 81, § 171, at 409.
172. CORET, *supra* note 2, at 142; EL-ERIAN, *supra* note 1, at 133.
173.

> "Partout où des ruisseaux, rivières ou fleuves feront limites, ils seront communs aux deux Etats, à moins que le contraire ne soit positivement stipulé .... Il ne pourra être fait ni au cours des rivières, ni à l'état actuel des bords aucune innovation quelconque, ni être accordé aucune concession ou prise d'eau sans le concours et le consentement des deux gouvernements; il en sera de même des fossés, rigoles, chemins, canaux, hayes ou tout autre objet servant de limites, c'est-à-dire que ces objets quant à leur souveraineté seront communs aux deux Puissances ....
>
> ....
>
> La pêche sera également commune et continuera d'être adjugée publiquement pour le compte des deux Etats ...."

CORET, *supra* note 2, at 142-43.

One should immediately note that islands themselves were not affected by this regime.[174] This condominium was upheld in a case before the German Supreme Court in 1932.[175]

d. The Gulf of Fonseca (Annex, Fig. 4)

In 1914, a dispute between El Salvador and Nicaragua arose out of the conclusion of a treaty by the latter with the Government of the United States, known as the Bryan-Chamorro Treaty of August 5, 1914.[176] This treaty related, inter alia, to the leasing, for ninety-nine years, of a naval base in the Gulf of Fonseca, the riparian states of which were Nicaragua, El Salvador, and Honduras.[177] El Salvador held that the treaty was "highly prejudicial to her supreme interests," and violated her rights of co-ownership in the Gulf.[178] Nicaragua contended that the Gulf was a bay owned exclusively by El Salvador, Honduras, and Nicaragua, but only as

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174. *See id.* at 143.

175. *See id.* at 144; EL-ERIAN, *supra* note 1, at 133-34. The appellant operated a mill on a stream that formed the boundary between Germany and the Netherlands. *See id.* at 134. He drew water from the stream for use in his mill and applied for registration of these water rights as provided for in the German Water Act. *See id.* The application was refused by the District Committee, whose decision was upheld on appeal by the Supreme Administrative Court. *See id.* The Court argued that "[the] Agreement of 1816 created a joint ownership under international law, a so-called Condominium, according to which both contracting states exercised a joint jurisdiction over frontier streams, [and therefore] the jurisdiction of each state was limited by that of the other state." *See id.* The Court held as follows: " 'Seeing that the Prussian State did not enjoy unrestricted jurisdiction over the stream, the German Water Act was therefore not applicable to frontier streams which were subject to the joint jurisdiction of Prussia and the Netherlands.' " *See id.* at 135 (quoting Supreme Administrative Court, Nov. 24, 1932, Reichs und Preussiches Verwaltungsblatt, vol. 55, at 528 (1934)).

As aptly noted by Coret:

> [C]an we still speak of "ownership" [*propriété*], even under international law, when it implies a right of jurisdiction? . . . Furthermore, each State's jurisdiction is not limited in this case by that of the other one, for there is no limitation, there is only a total absence of jurisdiction of one Signatory or the other, which the Court recognises almost verging on contradiction when it declares that the frontier streams are subject to the joint jurisdiction of Prussia and the Netherlands.

CORET, *supra* note 2, at 145.

176. *See Judicial Decisions Involving Questions of International Law*: The Republic of El Salvador v. The Republic of Nicaragua (Central Am. Ct. of Just.), 11 AM. J. INT'L L. 674, 674 (1917) [hereinafter *El Salvador Case*].

177. *See id.* at 674-75.

178. *Id.* at 675.

to the maritime territorial part that belonged to them respectively as owners of their coasts, in their respective parts.[179]

The dispute over the legal status of the Gulf was submitted to the Central American Court of Justice, which rendered its judgment on March 2, 1917.[180] The Gulf of Fonseca was under Spanish authority from its discovery in 1522 until 1827, and then it was under the sovereignty of the Federal Republic of the Center of America until to 1839.[181] In the same year, when the Federation came to an end, the three riparian states "in their character of autonomous nations and legitimate successors of Spain, incorporated [the Gulf] into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defense."[182] The parties acknowledged that the riparian countries of the Gulf were not demarcated until they became sovereign states.[183] Furthermore, there was no evidence that these states had ever successfully divided all the waters in the Gulf.[184] Even though a line had been drawn between Honduras and Nicaragua in 1900, it only went as far as a point midway between Tigre Island and Cosigüina Point.[185] No division had been completed between El Salvador and Nicaragua.[186] Thus, with the exception of the above mentioned part, the Court concluded that the remaining waters of the Gulf were undivided and in "a state of community" between the parties.[187]

The Central American Court of Justice qualified the Gulf as a "historic bay," since it was of paramount importance to the riparian States that have affirmed their peaceful ownership and possession in the Gulf

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179. *See id.* at 688.
180. *See id.* at 674.
181. *See id.* at 700.
182. *Id.*
183. *See id.* at 711.
184. *See id.*
185. *See id.*
186. *See id.* at 710.
187. *Id.* at 711. The I.C.J. later explained in *Land, Island and Maritime Frontier Dispute (Merits)* (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J. §§ 351, 400, 405 (Sept. 11):

> [The] three States jointly inherited by succession waters which for nearly three centuries had been under the single sway of the State from which they were the heirs; and in which waters there were no maritime administrative boundaries at the time of inheritance . . . . A joint succession of the three States to the maritime areas seems in these circumstances to be the logical outcome of the principle of *uti possidetis juris* itself.

Id.

without protest by any nation whatsoever.[188] The waters in the Gulf were thus described as "territorial waters,"[189] under the sole and undivided ownership of the three countries. "One coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common . . . ."[190] However, the parties were agreed, and so accepted the Court, that there existed a "littoral marine league" (a three-mile zone contiguous to the coast), which was the exclusive property of each state.[191] The Court also recognized a further zone of nine nautical miles as a zone of rights of inspection and the exercise of police power for fiscal purposes and for national security[192] (each state possessing therefore a right of *imperium* in these waters).[193] The Court also said that merchant vessels of third states enjoyed a right of *uso innocente* in the nonlittoral waters of the Gulf, that is, those waters not subject to the exclusive jurisdiction of each riparian state.[194]

In 1992, in a case opposing Honduras and El Salvador, a Chamber of the I.C.J. paralleled the opinion of the Court as to the particular regime of the historic waters of the Gulf. It found that "the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint

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188. *El Salvador Case*, *supra* note 176, at 707.

189. *Id.* at 717. The Court endorsed Drago's comment on *North Atlantic Fisheries Arbitration*, 11 R.I.A.A. at 173, in his dissent:

> [A]s a general rule[,] . . . the marginal belt of territorial waters should follow the sinuosities of the coast, so that the marginal belt being of three miles, only such bays should be held as territorial as have an entrance not wider than six miles [the waters seaward of the belt usually being considered high seas].
>
> . . . .
>
> But this refers to common or ordinary bays, and not to those which, in our dissent, we have called "historic bays." As has been seen, the principle that underlies all the rules and jurisdictional distances is no other than that of paramount necessity to protect fiscal interests, persons and territory of the nation that claims sovereignty over the contiguous seas and over the gulfs, bays, and coves that penetrate its coast line.

El Salvador Case, *supra* note 176, at 708.

190. *El Salvador Case*, *supra* note 176, at 712.

191. *Id.* at 711.

192. *See id.* at 715.

193. *See id.* at 711.

194. *See id.* at 715.

sovereignty of the three coastal States."[195] As to the meaning of "territorial waters" in the 1917 Judgment, the Chamber stated:

> [T]he term "territorial waters" was, 75 years ago, not infrequently used to denote what would now be called "internal" or "national" waters. To have recognized exclusive "maritime belts" along the littoral *inside* those "territorial waters," the property of the three States in common, was no doubt an anomaly in terms of the modern law of the sea; but it was in accord with what had emerged from actual practice of the coastal States in the Gulf of Fonseca at that time, and was perhaps also a remnant of the view that the maritime belt in a pluri-State bay, followed the sinuosities of the coast, the remainder of the bay waters being high seas.[196]

The Chamber noted that the right of innocent passage was at odds with the present legal status of the waters of a bay as constituting internal waters, whether the waters were of a juridical bay or one that had arisen from a historic title. However, the court continued:

> [T]he rules which normally apply to "bays the coasts of which belong to a single State" are not necessarily appropriate to a bay which is a pluri-State bay . . . . The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular regime, not only of joint sovereignty but of rights of passage. It might, therefore, be sensible, to regard the waters of the Gulf, insofar as they are the subject of the condominium or co-ownership, as *sui generis*.[197]

It should also be noted that the Chamber remarked that it was possible to establish a condominium by other means than a treaty.

> [I]t is true that condominium as term of art in international law usually indicates just such a structured system for the joint exercise of sovereign governmental powers over a territory; a situation that might more aptly be called co-imperium. But

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195. *See Merits*, 1992 I.C.J. REPORTS § 404. As to the 1900 Honduras/Nicaragua partial delimitation, the Chamber noted that El Salvador emphasized that it was not binding on El Salvador. *See id.* However, since the latter country was bound by the 1917 Judgment, which had acknowledged the 1900 delimitation, the Chamber concluded that the existence of the delimitation had been accepted by El Salvador. *See id.*

196. *Id.* § 392.

197. *Id.* §§ 393, 412.

> this is not what the Central American Court of Justice had in mind. By a condominium they clearly meant to indicate the existence of a joint sovereignty arising as a juridical consequence of the succession of 1821.[198]

As to the legal status of the waters seaward of the closing line of the gulf, the Chamber noted that since the legal situation on the landward side of the closing line was one of joint sovereignty, it followed that all three of the joint sovereigns must have entitlement outside the closing line to the territorial sea, continental shelf, and exclusive economic zone. Whether this situation should remain, or be replaced by a division and delimitation into three separate zones was, as it also was regarding inside the Gulf, a matter for the three states to decide.[199]

2. Colonial Condominia

a. The Canton and Enderbury Islands

Canton lies approximately 1850 miles southwest of Hawaii, and Enderbury lies 32 miles southeast of Canton.[200] Both are members of the Phoenix Islands group, which had been claimed by Great Britain since 1892.[201] The first accurate map of the islands was drawn by the Americans

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198. *Id.* § 404. According to the present writer, this reasoning, clearly inspired by the private law of succession is highly susceptible to criticism, not only because the Chamber simply endorsed the view that the absence of demarcation results in the condominium situation in a state succession situation, but also because the private law analogy misses the point that heirs always expressly or tacitly approve of their inheriting from the testator. However, the Chamber noted that "Honduras oppos[ed] the condominium idea and accordingly call[ed] in[to] question the correctness of this part of the 1917 Judgment . . . . Nicaragua, the intervening State, which was a party to the 1917 proceedings, [wa]s and ha[d] consistently been opposed to the condominium solution." *Id.* § 398. With regard to the 1917 Judgment, the Chamber said that it was a valid decision of a competent court, thus having the status of *res judicata* between El Salvador and Nicaragua. *See id.* § 403. With regard to the proceedings before the Chamber, the latter stated that "the question of the existence or not of a *res judicata* arising from a case with two parties is not helpful in a case raising a question of a joint sovereignty of three coastal States." *Id.* Also note that the Chamber alternatively considered a condominium as joint sovereignty, joint *exercise* of sovereign governmental powers, and even a co-imperium. *See id.* These are notions based on the sovereignty concept and we rejected them as definitions of a condominium.

199. *See id.* § 420. This judgment was heavily criticised by Judge Oda, who in his Dissenting Opinion admitted that he had difficulties in understanding the legal concepts forged by the Chamber. *See id.* § 760 (dissenting opinion of Judge Oda); *see also* Iain Scobbie, *The I.C.J. and the Gulf of Fonseca: When Two Implies Three but Entails One*, 18 MAR. POL'Y 249-62 (1994).

200. *See* EL-ERIAN, *supra* note 1, at 144.

201. *See id.*

between 1838 and 1842.[202] By virtue of the the Act of 1856, approximately one hundred islands, rocks, and keys in the Caribbean and the Pacific were put under U.S. jurisdiction.[203]

The United States claimed title over Canton and Enderbury under the Guano Act of 1856, whereas Great Britain annexed the islands and then incorporated them within the Phoenix Group for administrative purposes, pretending that they were *terra nullius*.[204] The Phoenix Group was included as part of the Gilbert and Ellice Islands colony by Order in Council of 1937.[205] Early in 1938, President Roosevelt issued an Executive Order that put Canton and Enderbury under the administrative control of the U.S. Secretary of the Interior.[206] In 1938, negotiations between the two governments were successfully concluded, and by an exchange of notes, dated April 6, 1939, the two countries entered into an agreement regarding the islands.[207] This agreement provides as follows:

> 1. The Government of the United States and the Government of the United Kingdom, without prejudice to their respective claims to Canton and Enderbury Islands, agree to a joint control over these islands.
> 2. The Islands shall, during the period of joint control, be administered by a United States and a British official appointed by their respective Governments.
> . . . .
> 6. An airport may be constructed and operated on Canton Island by an American company or companies, satisfactory to the United States Government, which, in return for an agreed fee, shall provide facilities for British aircraft and British civil aviation companies . . . .
> 7. The joint control . . . shall have a duration of fifty years from this day's date. If no agreement to the contrary is reached before the expiration of that period the joint control shall continue thereafter until such time as it may be modified or terminated by the mutual consent of the two Governments.[208]

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202. *See* J.S. Reeves, *Agreement over Canton and Enderbury Islands*, 33 AM. J. INT'L L. 521, 523 (1939).

203. *See id.* at 524.

204. *See* EL-ERIAN, *supra* note 1, at 144-45; Reeves, *supra* note 202, at 523.

205. *See* EL-ERIAN, *supra* note 1, at 145.

206. *See id.*

207. *See id.*

208. Reeves, *supra* note 202, at 522.

b. The Sudan (1936-1956)

As previously mentioned, under the 1899 Agreement, the Sudan qualified as a coimperium. Therefore, one should turn to the years 1914-1956 to inquire whether there really was a condominium over the Sudan during that period. By the Treaties of Sèvres and Lausanne, Turkey had to give up all her rights and titles over the Sudan by November 5, 1914.[209] In 1915, Great Britain proclaimed a protectorate over Egypt.[210] From that date onward, the status of the Sudan was defined by the relations between Great Britain and Egypt. On February 28, 1922, the British government ended its Protectorate over Egypt, declaring Egypt to be an independent sovereign state.[211] However, some issues were reserved for future agreement, that is, the *status quo* was preserved, including the status of the Sudan.[212] Consequently, the Sudan cannot be considered as having been under an Anglo-Egyptian condominium from 1922 onwards, for there surely existed a legal and functional inequality between Great Britain and Egypt. Hence, one has to recognize the Sudan "as a territory that *belongs to an unequal partial international community:* the community that exists between Great Britain and Egypt after the declaration of 28 February 1922."[213]

The relations between Great Britain and Egypt were finally regulated by a treaty of friendship and alliance, signed on August 16, 1936, which was motivated by Italy's invasion of Ethiopia.[214] The treaty addressed the status of the Sudan:

> 1. While reserving liberty to conclude new conventions in the future modifying the agreements of the 19th of January and the 10th of July, 1899, the High Contracting Parties agree that the administration of the Sudan shall continue to be that resulting from the said agreements. The Governor-General shall continue to exercise on the joint behalf of the High Contracting Parties the powers conferred upon him by the said agreements.

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209. *See* EL-ERIAN, *supra* note 1, at 161.

210. *See* MEKKI ABBAS, THE SUDAN QUESTION 57 (1952).

211. *See* EL-ERIAN, *supra* note 1, at 183.

212. *See id.*

213. "comme un territoire à l'égard duquel la *jouissance et l'exercice des compétences appartiennent à une communauté internationale partielle inégalitaire.* Cette communauté est celle qui existe entre l'Angleterre et l'Egypte après la déclaration du 28 février 1922." CORET, *supra* note 2, at 167.

214. *See* EL-ERIAN, *supra* note 1, at 186.

> Nothing in this Article prejudices the question of the sovereignty of the Sudan.
>
> . . . .
>
> 5. There shall be no discrimination in the Sudan among British subjects and Egyptian nationals with regard to commerce, immigration or acquisition of property.
> 6. The High Contracting Parties agree on the provisions contained in the Annex of the present Article relating to the method according to which international conventions will be applicable to the Sudan.[215]

What is the value of the provision on sovereignty? This cannot be construed as meaning that sovereignty over the Sudan might be vested in a third state, or that it is simply in abeyance. In fact, the 1936 agreement had created a genuine partial international condominial community enjoying state competences over the Sudan. The provision only sought not to prejudice the future relations of the condomini and the condominium, should one member of the community later acquire sovereignty over the condominial territory. Furthermore, the mention of the maintenance of the 1899 regime was a legal absurdity, for the condominial community was now characterized by the equality of its members, as shown by the Annex to Article 11 on the negotiation of agreements procedure. From 1948 onwards, the regime was tainted by unilateral initiatives by the condomini to put an end to the condominium. In an agreement of February 12, 1953, both countries agreed on the existence of a right of self-determination for the Sudanese people and established a transitory period leading to independence; the latter was proclaimed by the Sudanese Parliament on January 1, 1956.

c. The New Hebrides (Annex, Fig. 1)

The New Hebrides islands have been made remarkable by their geographic situation in the Western Pacific.[216] In 1825, sandalwood was discovered on Erromango and a trade thereof was organized from Sidney by lawless Europeans who instigated native wars and massacres.[217] Presbyterian missionaries arrived in 1848 and after the appearance of Marist missionaries, began a struggle with France for influence in the

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215. *Id.* at 186-87 (quoting 1936 Treaty of Friendship and Alliance, art. 11, 1936 BR. Y.B. INT'L L. 18, 91).

216. *See* O'Connell, *supra* note 2, at 71.

217. *See id.* at 71-72.

islands.[218] In the 1850s, the growing number of French settlers led to numerous calls for French annexation,[219] while the British government was implicated by Australian investment. In 1878, Britain and France acknowledged that the Australian public and the settlers on the islands were increasingly discontent with the situation.[220] Both governments agreed not to affect "what was ambiguously referred to as the 'independence' of the Group."[221] However, in 1882, the formation of the French *Compagnie Calédonienne des Nouvelles Hébrides* was a definitive act toward an overwhelming French interest in the islands.[222]

The New Hebridean situation progressively began to rigidify, and in 1886, the French government proposed an *entente commune*, which led to the Convention of 16 November 1887.[223] This convention established a Joint Naval Commission, staffed by British and French naval officers, who were to maintain order and protect the lives and property of the British and French in the New Hebrides.[224] In 1887, a very vague Anglo-French condominium was established.[225] However, this regime cannot be considered a condominium as we have defined it, for it was simply a system of joint protection of national interests in a *terra nullius*; no foreign power was precluded from later taking possession of the New Hebrides.[226] However, events had overtaken the machinery of the Joint Commission, and an intensification of the Anglo-French presence could not be delayed.

In 1900, France began to introduce French law into the islands with respect to French citizens, thus complementing the 1893 Pacific Order in Council, which gave the British High Commissioner of the Western Pacific's Court jurisdiction to decide cases affecting British citizens in conformity with the substance of the law in force in England.[227] An Anglo-

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218. *See id.* at 72.
219. *See id.*
220. *See id.* at 73.
221. *Id.*
222. *See id.*
223. *See id.* at 74-75.
224. *See id.* at 75 (citing Convention of 16 November 1887, art. 2).
225. Nicolas Politis, *La condition internationale des Nouvelles Hébrides*, 8 R.G.D.I.P. 121-52, 230-71 (1901).
226. Politis recognized that "l'archipel néo-hébridais n'est soumis à aucune souveraineté [the archipelago of the New Hebrides is not subject to any sovereignty]"; therefore, the system set up under the 1887 Convention could not be termed a condominium. *Id.* at 260.
227. *See* O'Connell, *supra* note 2, at 75. The 1890 Foreign Jurisdiction Act had already stated:

> It . . . shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within

French Declaration was made on April 8, 1904, anticipating the theory of a "sphere of joint influence,"[228] which would underlie the Convention of 20 October 1906.[229] The 1906 Convention stated that "the Group of the New Hebrides, including the Banks and Torres Islands, [would] form a region of 'joint influence' . . . and neither [Power would] exercise a separate control over the Group."[230] The principles of the condominium were stated in the "General Instructions to the British and French High Commissioners," of August 29, 1907.[231] The Instructions stated as follows:

> [T]he desire of the two Governments is to secure the exercise of their paramount rights (*droits de souveraineté*) in the New Hebrides. The two Powers, who were mutually bound not to intervene separately in the New Hebrides, now agree to intervene there together. Instead of remaining mutually exclusive, their paramount rights are combined; the two countries jointly assume jurisdiction (*souveraineté*) in the islands, and thereby provide against the possible appearance of a third Power.[232]

One should not be too much confused by the terms employed, since both powers recognized that "'[d]iplomatic history furnished no exact precedent.'"[233] Indeed, a "joint jurisdiction" is obviously different from a "joint influence," and both powers adopted the joint-sovereignty view. Since the new regime immediately experienced difficulties, a protocol to the 1906 Convention was adopted at a conference in London in 1914; the Protocol, however, was not ratified until 1922.[234] It essentially affected the government and administration of the condominium, but not its basic status.

> a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

53 & 54 Vict. c. 37 (Eng.).

228. EL-ERIAN, *supra* note 1, at 141-42. "The two Governments agree to draw up in concert an agreement which, without involving any modification of the political status quo, shall put an end to the difficulties arising from the absence of jurisdiction over the natives of the New Hebrides." 97 B.F.S.P. at 53.

229. *See* O'Connell, *supra* note 2, at 75-76.

230. *Id.* at 92 (citing Convention of 1906, art. I(1)).

231. *See id.* at 93.

232. *Id.* (citing 100 B.F.S.P. at 519).

233. *Id.*

234. *Id.* at 76.

In 1954, another conference was convened in Honiara to examine amendments to the 1914 Protocol. However, since Britain had little interest in remaining in the New Hebrides and considering the growth of the nationalist movement at the end of the 1960s, it soon became obvious that the only way out was independence, which was achieved in 1979.

3. Succession Condominia

These condominia are usually established at the end of a war by a treaty. The vanquished state cedes one or several territories to a coalition or members of a coalition. As such, these condominia are examples of state succession with regard to territories.[235]

a. The Schleswig-Holstein Duchies (Annex, Fig. 3)

The Duchies of Schleswig, Holstein, and Lauenbourg were the subject of a dispute between Denmark and Germany for hundreds of years.[236] According to the Treaty of Vienna of 30 October 1864, which ended the war between Denmark, and Austria and Prussia, Denmark ceded the Duchies to Austria and Prussia.[237] Article 3 of the Treaty provided: "His Majesty the King of Denmark renounces all His rights over the Duchies of Schleswig, Holstein and Lauenbourg in favour of their Majesties the King of Prussia and the Emperor of Austria, engaging to recognise the dispositions which their said Majesties shall make with reference to those Duchies."[238] In 1865, Austria and Prussia agreed on the organization of the condominium over the duchies.[239] By the Convention of Gastein of August 14, 1865, Lauenbourg was ceded to Prussia, and the exercise of the rights over the two other duchies was divided between Austria and Prussia.[240] A few distinctions, however, need to be made with regard to Lauenbourg: "[I]t does not involve the sale by Austria of alleged rights over a territory that is not Austria's since the territory is condominial; it is the sale of Austria's rights to participate in the partial international condominial

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235. *See* CORET, *supra* note 2, at 189.
236. *See* EL-ERIAN, *supra* note 1, at 129.
237. *See id.*
238. *Id.* at 129-30 (quoting Peace Handbooks, No. 35, Great Britain Foreign Office, at 102-03 (1929)).
239. *See id.* at 130.
240. *See id.*

community."[241] As to the Schleswig and Holstein, the condominial regime was not questioned but the exercise of the competences by the partial international condominial community was radically changed.[242] The enjoyment of the competences belonged to the community, but the exercise of these competences was allocated among the member states of the community on a geographical basis, as a decentralised condominium.[243] Following the Austro-Prussian War, under Article 5 of the Treaty of Prague, August 23, 1866, Austria gave Prussia all Austria's rights over Schleswig-Holstein.[244]

b. Dantzig (January 10 to November 15, 1920)

Dantzig, a city located at the mouth of the Vistula river, is one of the territories detached by the Peace Treaties from the Central Powers after World War I, ceded to the Principal Allied and Associated Powers, and held by them in condominium pending final allocation.[245] Section XI of Part II of the Treaty of Versailles of 28 June 1919 dealt with Dantzig.[246] Article 100 of the Treaty reads: "Germany renounces in favor of the Principal Allied and Associated Powers all her rights and title over [Dantzig]."[247] However, this condominium was only temporary, for Articles 102 made it clear that the Principal Allied and Associated Powers

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241. "Il s'agit de la vente par l'Autriche non point de prétendus droits sur un territoire qui n'est pas le sien par définition puisqu'il est condominial, mais de son droit de participation à la communauté internationale partielle condominante, en ce qui concerne une partie du territoire condominial." CORET, *supra* note 2, at 190.

Articles 2 and 3 of the Gastein Convention provided that Kiel and Rendsbourg were to be ceded to the German Confederation at a later stage. *See id.* In the meantime, a special condominial administration was set up. *See id.* at 191.

242. *See id.* at 191. "[L]e régime condominial n'est pas mis en cause, [mais] les conditions d'exercice des compétences par la communauté internationale partielle condominante sont fondamentalement transformées." *Id.*

243. *See id.* "En effet, si la jouissance des compétences demeure attribuée à la communauté, l'exercice de ces mêmes compétences fait l'objet d'une répartition géographique entre Etats membres de la communauté; c'est ce que nous qualifions de 'condominium décentralisé.'" *Id.*

244. *See* EL-ERIAN, *supra* note 1, at 131.

245. *See* CORET, *supra* note 2, at 194. One could also cite, inter alia, the cases of Northern Dobroudja from May 1918 (Treaty of Bucharest creating a condominium of Austria-Hungary, Germany, Bulgaria and Turkey) to November 1919 (Treaty of Neuilly by which the territory was ceded to Romania), *see id.* at 193, and of Memel from June 1919 (Article 99 of the Treaty of Versailles creating a condominium of France, Great Britain, Italy and Japan) to May 1924 (Treaty of Paris by which the territory was ceded to Lithuania), *see id.* at 196-98. The question of the ex-German colonies and the theory of mandates has already been discussed.

246. CORET, *supra* note 2, at 194.

247. Treaty of Versailles, *supra* note 153, art. 100.

would undertake to establish the town of Dantzig, together with certain neighboring territories, as a Free City to be placed under the protection of the League of Nations.[248] When the Treaty of Versailles came into force on January 10, 1920, the Free City of Dantzig was created.[249] According to Article 104 of the Treaty,

> [t]he Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Dantzig, which shall come into force at the same time as the establishment of the said Free City, with the following object:
>
> . . . .
>
> (6) To provide that the Polish Government shall undertake the conduct of the foreign relations of the Free City of Dantzig as well as the diplomatic protection of citizens of that city when abroad.[250]

On November 9, 1920, the envisaged treaty was concluded at Paris and came into force on November 15.[251] Hence, one could consider that the condominium over Dantzig lasted from January 10 to November 15, 1920, for it was on January 10, 1920 that the principal powers (France, Great Britain, Italy, and Japan), appointed the president of the district to administer the territory temporarily *in their own names*.[252] In November 1920, a constitution was adopted, and in May 1922 it was formally approved by the League of Nations, transforming this condominium into a state having close relations with the League of Nations and Poland.[253]

c. Germany After 1945

On June 5, 1945, under the Declaration of Berlin, the United States, the Union of Soviet Socialist Republics, the United Kingdom, and the provisional government of the French Republic assumed "'supreme authority with respect to Germany including all the powers possessed by the German Government, the high command, and any state, municipal, or local government or authority.'"[254] These governments further declared

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248. *See* Malcolm M. Lewis, *The Free City of Dantzig*, 1924 BRIT. Y.B. INT'L L. 89, 90.
249. *See* CORET, *supra* note 2, at 194.
250. Treaty of Versailles, *supra* note 153, art. 104.
251. *See* CORET, *supra* note 2, at 194.
252. *See id.*
253. *See* Lewis, *supra* note 248, at 90-92.
254. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 518 (1945) (quoting Declaration of Berlin, 68 U.N.T.S. 189, 60 Stat. 1649

that they would decide the boundaries and status of Germany or any area considered part of German territory.[255] Hans Kelsen writes that this meant "the German territory, together with the population residing on it, [had been] placed under the sovereignty of the four powers."[256] He argues that since there was no longer a legitimate German government, "the unconditional surrender signed by the representatives of the last legitimate Government of Germany [could] be interpreted as a transfer of Germany's sovereignty to the victorious powers signatories to the surrender treaty."[257]

This regime was qualified by Kelsen as a condominium, which he defines as "two or more states exercis[ing] jointly their sovereignty over a certain territory."[258] Though, as already explained, we do not share this definition of a condominium — indeed, Kelsen does not explain who *enjoys* the sovereign rights over Germany, nor does he avoid the error of speaking of "common organs of the participating states"[259] — we share the view that Germany, by this Declaration, became a condominial territory.

It has, however, been suggested that the Declaration put Germany under a collective belligerent occupation.[260] This view is based on a two-fold mistake. First, as explained by Kelsen, belligerent occupation was not possible in Germany after its unconditional surrender, as Germany was in a state of *deballatio*,[261] and especially after the Government of Grand Admiral Doenitz had collapsed. Indeed, belligerent occupation requires a state of war between the occupant and the occupied states.[262] According to Kelsen, Germany no longer existed as a sovereign state once its last government had been abolished by the Allies.[263] Secondly, the status of

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(1945)).

255. *See id.* at 521-22.

256. *Id.* at 518.

257. *Id.* at 518-19.

258. *Id.* at 523.

259. *Id.* at 524.

260. *See* DINH ET AL., *supra* note 107, § 323, at 470. Dinh and colleagues state that "[i]l s'agissait d'une substitution totale, mais temporaire, de compétence; car il n'était pas question d'annexer ce pays ni d'attribuer aux Alliés, même collectivement, la souveraineté territoriale en Allemagne. Les occupants se réservaient seulement l'exercice des attributs de la souveraineté territoriale, dans l'attente de l'apparition d'un nouveau gouvernement allemand . . . ." [It was a matter of a complete, though temporary, substitution of jurisdiction; indeed, it was not envisaged to annex this country or to attribute to the Allies, even collectively, territorial jurisdiction over Germany. The occupying forces had only reserved the exercise of the attributes of territorial jurisdiction, until a new German government would be created.] *Id.*

261. *See* Kelsen, *supra* note 254, at 520.

262. *See id.* at 518; Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907, arts. 42-56.

263. *See* Kelsen, *supra* note 254, at 519.

occupation assumes that belligerent occupation does not confer upon the occupant power sovereignty of the occupied state. However, those advocating the occupation theory base their rejection of the condominium solution on the ground that the condominial territory must be annexed to those of the condomini.[264] But we have seen that this is flatly wrong because the condominial territory is not a common territory of the condomini, but a territory submitted to the competences of an international condominial community. Actually, this principle is recognized by the Declaration, which " 'does not effect the annexation of Germany.' "[265] However, this has been misinterpreted by Kelsen who sticks to the theory of sovereignty to explain a condominium. According to Kelsen, the "non-annexation view" is untenable because "Germany certainly ha[d] ceased to exist as a sovereign state and, since the territory [wa]s not under Germany's own sovereignty, it would be no state's land if it were not under the sovereignty of the occupant powers."[266]

As a result, the only difference Kelsen sees between subjugation (read conquest) of, and condominium over, Germany, is that the former implies annexation (that is, permanent acquisition) while the latter means provisory acquisition.[267] This seems to be in complete contradiction with the theory of condominium, for it is hard to see how the international condominial community, which does not have an international personality, could properly annex a territory. A more accurate conclusion would be that the condominial community enjoyed and exercised state competences over the German territory. International organs were set up for this purpose, since the "supreme authority" was exercised by four commanders-in-chief constituting the control council.[268] As this exercise was divided into four zones of occupation for administrative purposes, one could consider this condominium as being decentralized.[269] As a consequence of the status of Germany, the unilateral creation of two German states in 1949, first by the three Western Powers, and then by the USSR, was made in violation of the

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264. *See* 2 OPPENHEIM'S INTERNATIONAL LAW § 170, at 567 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). "When on June 5, 1945, [the Allies] . . . assumed supreme authority over [Germany], they provided an example of joint exercise of 'supreme governmental authority;' it was not, however, properly a condominium because there was no annexation of the territory." *Id.* If so, what kind of a regime was this? Note that in the 1953 edition, there was no reference to annexation, and it was written that the Allies provided an example of "joint exercise of sovereignty." 1 OPPENHEIM, *supra* note 81, § 171, at 411.

265. Kelsen, *supra* note 254, at 520; *see* CORET, *supra* note 2, at 217.

266. Kelson, *supra* note 254, at 521; *see* CORET, *supra* note 2, at 217-18.

267. *See* Kelsen, *supra* note 254, at 524.

268. *Id.* at 523.

269. *See id.* at 524.

Berlin Declaration and the Postdam Agreement.[270] This violation of condominial law can only be appreciated according to the general rules of the creation of states in international law and the principle *ex injuria jus non oritur*, which cannot be analyzed without losing touch with our present topic.[271]

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270. CORET, *supra* note 2, at 222-23.

271. One could not invoke the desuetude or tacit termination of the quadripartite agreements because both the Western States and the USSR continued to talk about their "reserved rights [*droits réservés*] in Germany" to justify their position towards West and East Germany. *Id.* at 225. Taking into account the existence of those states, the recognition of which had been secured in 1954 for each of them, one could adopt the view stated by Coret that "[u]nder the formal plan the condiminial status persists." *Id.* However, as Coret continues:

> Sur le plan matériel . . . [l]'échec du fonctionnement du statut condominial a donné naissance à deux situations effectives dont l'une est celle d'un statut de *coimperium* [exercé par les Occidentaux sur la République fédérale allemande] et l'autre celle d'un régime d'imperium [exercé par l'URSS à l'égard de la République démocratique allemande].
>
> Il en résulte que tout en conservant intégralement son titre à la jouissance et à l'exercice des compétences à l'échelon de l'ensemble de l'Allemagne, chacun des Etats membres de la communauté n'exerce en fait que certaines responsabilités singulièrement plus restreintes matériellement que ces compétences, sur une partie du territoire allemand, partie sur laquelle existe au surplus un Etat allemand.
>
> [In reality . . . the failure of the condominial regime has given birth to two effective situations, one of which being that of a co-imperium [exercised by the Western States over the German Federal Republic], and the other one being that of an imperium [exercised by the USSR over the German Democratic Republic].
>
> As a result, while fully keeping its title to the enjoyment and exercise of the competences over the whole of Germany, each of the member States of the community only exercises certain responsibilities which, in fact, are far more restricted than these competences, over a part of German territory on which, in addition, on finds a German State.]

Id. at 226. Nonetheless, one can legitimately ask whether Coret identified all the consequences of the creation of these two states by the condomini and recognized by other powers. This was a situation flatly incompatible with the survival of the condominial regime, even if one accommodated it with a putative co-imperial regime. Indeed the question remains as to the extent to which the quadripartite agreements are still applicable to the two states according to the *pacta tertiis* rule. *See* REUTER, *supra* note 126, § 168, at 101. Might it not be more convenient to talk of zones of influence over the two German states?

III. CONDOMINIA *IN CONCRETO*

A. Territorial Jurisdiction

It has been noted that theories that take the state as a starting point cannot explain correctly the legal nature of a condominium.[272] Indeed, we have referred to the private law theory of territory as the "object" of the state,[273] a theory we rejected in general. This theory is even more erroneous when it comes to the territorial jurisdiction over a condominium. Cavaglieri states that the right of a state over its territory is like a right *in rem* (*un droit de nature réelle*), a dominium, the nature and effects of which are governed by public law.[274] This right encompasses the whole territory and has nothing to do with a right of ownership, which under private law would be exercised by individuals over parts of the territory.[275] The former feudal law confusion between *dominium eminens* and private property is contrary to the modern notion of the state.[276] The only feature common to both rights is the absolute and exclusive power, with a *jus excludendi alios*, exercised by a state, vis-à-vis the other states, and an owner vis-à-vis the other owners.[277] Cavaglieri distinguishes coimperium from condominium, explaining that coimperium "does not entirely suffice to explain the legal power of each interested State over the joint territory .... This exceptional situation finds its legal justification if we consider that the territory in question is the subject of a genuine right of *condominium* and hence, belongs to them *pro indivisio*."[278] This view is

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272. *See* Schneider, *supra* note 7, at 59 (stating that "the notion of an association of sovereignties over a single territory is incompatible with the idea of a territory subject to a community of States").

273. *See* EL-ERIAN, *supra* note 1, at 94-95; *supra* notes 46-74 and accompanying text.

274. *See* Cavaglieri, *supra* note 79, at 385. "[N]ous croyons que le droit de l'Etat sur son territoire est un droit de nature réelle, un *dominium*, dont la nature et les effets appartiennent au droit public." *Id.*

275. *See id.* "Ce droit embrasse tout le territoire dans sa composition unitaire et n'a par conséquent rien à voir avec le droit de propriété, qui serait exercé par des particuliers et dans la sphère du droit privé sur des fractions de ce même territoire." *Id.*

276. *See id.* "L'ancienne confusion du droit féodal entre *dominium eminens* et propriété privée est contraire à la notion moderne de l'Etat ...." *Id.*

277. *See id.* "Il n'y a qu'un seul point commun aux deux droits. C'est celui du pouvoir absolu et exclusif sur le domaine, avec un *jus excludendi alios* que l'Etat fait valoir énergiquement vis-à-vis des autres Etats et le propriétaire vis-à-vis des autres propriétaires." *Id.*

278. "ne suffit pas à expliquer entièrement le pouvoir juridique de chacun des Etats intéressés sur le territoire commun .... Cette situation exceptionnelle trouve sa justification juridique dans la considération que le territoire en question est l'objet d'un véritable droit de *condominium* et leur appartient, par conséquent, *pro indivisio*." *Id.* at 388-89.

obviously wrong, for how could *each condomini* have a legal power over a condominium and at the same time hold it in an undivided form with the other condomnini? This could only be tenable were the condominium a *copropriété*, which it certainly is not since each condomini does not enjoy a right *in rem* over a portion of the condominial territory.

Nor is the doctrine of the territory being the state itself capable of explaining territorial jurisdiction over a condominium, since this theory (notably advocated by Jellineck or Carré de Malberg) finds itself in dire straits when in comes to the relations between the legal personality of the state and its continuity in cases of cession and adjunction of territory. Since a condominial territory is never annexed to its condomini, either the territory is not always assimilated into the state, or the condomini lose their statehood in the condominium. But this is in complete contradiction with the territory-subject theory, which leaves the condominium as a regime *sui generis*. A third theory sees in the territory the limit of sovereignty. But once again, this would call for tools identifying how each condomini could consider the condominial territory as "being the subject of a right of the State and the space wherein it exercises its sovereignty and its jurisdiction."[279]

As previously stated, only the theory of competences held by the condominial community is able to describe what kind of territorial jurisdiction is exercised over the condominial territory. Territorial jurisdiction, *compétence territoriale*, has been defined by Rousseau in a two-fold way.[280] First, it implies a legal power, and consequently, must be understood as a body of legal powers recognised as belonging to the state.[281] Secondly, it is characterized by "its exclusive nature, which basically implies a monopoly of the state in three areas: coercion [*contrainte*], justice [*le jouvoir juridictionnel*], and the organisation of public services."[282] This territorial jurisdiction is enjoyed by the

279. "l'objet d'un droit de l'Etat et l'espace à l'intérieur duquel s'exercent sa souveraineté et sa juridiction." Lauterpacht, *supra* note 48, at 321; *see* Bourquin, *supra* note 93, at 114-15 (stating that in fact, the state is nothing more than a "normative order" [*ordre normatif*], and the territory is nothing more than the portion of the space wherein the validity of this order is, in principle, circumscribed).

280. *See* CORET, *supra* note 2, at 43.

281. *See id.* It implies "un pouvoir juridique et il faut par conséquent entendre par souveraineté territoriale un ensemble de pouvoirs juridiques reconnus à un Etat pour lui permettre d'accomplir, dans un espace déterminé, les fonctions étatiques" *Id.*

282. "son exclusivisme qui implique essentiellement un monopole en trois domaines: monopole de la contrainte, de l'exercice du pouvoir juridictionnel, de l'organisation des services publics." *Id.; see Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 831 (U.N. Trib. Arb. 1928).

condominial community, not only to the exclusion of third states,[283] but also to the exclusion of the condomini. The latter consequence has often led to misunderstandings. Indeed, in their "Instructions to the High Commissioners of the New Hebrides," dated August 29, 1907, the British and the French governments stated that " 'the two nations, who formerly exercised only a personal jurisdiction over their own nationals, assume a quasi-territorial jurisdiction. For the British resident, that jurisdiction will be British, for the French it will be French.' "[284] The French version reads: " 'The national law, which governed them [the citizens] until the present in a personal capacity, governs them from now on in a territorial capacity; for the French, the archipelago is French territory, and for the English, English Territory.' "[285] These texts obviously do not coincide.[286] The British text evades the idea that the territory is British territory for British subjects, and refers to "jurisdiction."[287]

> The system contrived in the New Hebrides is described in the English text as "quasi-territorial," with the implication that the jurisdiction of the two Powers is not in all respects plenary; and the conclusion is that the Group is part neither of the British nor the French national domain .... But in the French text the jurisdiction is "*à titre territorial*;" this means that the territory is, for French citizens, and for aliens who opt for the French system, French territory ....[288]

The French view is unacceptable because it completely emasculates the fact that the condominial territory is not a joint territory that each of the condominii is entitled to consider its own. If such were the case, each could accomplish sovereign acts on the territory. This view does not differentiate between territorial jurisdiction and the territorial aspect of a competence that is granted by condominial law to the condomini. The British view is by far the more accurate, for the New Hebrides has never been considered a British territory,[289] while the French position is less clear. The New Hebrides clearly did not qualify as a *département d'outre-mer*

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283. *See supra* note 126 and accompanying text.

284. O'Connell, *supra* note 2, at 94 (quoting 100 B.F.S.P. 520).

285. " '[L]a loi nationale, qui les [the citizens] régissait jusqu'à présent à titre personnel, les régit dorénavant à titre territorial; pour les Français, l'archipel est territoire Français, pour les Anglais, territoire Anglais.' " *Id.*

286. *See id.*

287. *See id.*

288. *Id.*

289. *See id.* at 109.

[overseas department], a *territoire d'outre-mer* [overseas territory], or an *Etat associé* [associated state] within the meaning of the French Constitution of the Fourth Republic.[290] The *Comité juridique de l'Union française* considered in 1948 that the New Hebrides could qualify as a *territoire associé* [associated territory].[291] They reasoned that the uncertainty regarding the category of associated territories would enable one to hold that the New Hebrides belonged to the French Commonwealth since the archipelago was subject to a regime of condominium but in proportion to the French influence there.[292] This obviously confuses territorial jurisdiction and the territorial aspect of the personal jurisdiction, which in the case of the New Hebrides is *enjoyed and exercised* by France over French nationals (and by Great Britain over British nationals).[293]

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290. *See id.* at 85.

291. *See id.* (citing *Comité juridique de l'Union française*, 2 REV. JUR. DEL'UNION FRANÇAISE 241 (1948)).

292. *See id.*

> "Cette incertitude concernant la catégorie des territoires associés permettrait de soutenir que les Nouvelles Hébrides rentrent à ce titre dans l'Union française, non pas d'une façon totale puisque l'archipel est soumis à un régime de condominium, mais *parte in qua*, c'est-à-dire dans la mesure de l'influence qu'y exerce la France . . . ."

Id. (quoting *Comité juridique de l'Union française*, *supra* note 291, at 241). The *Comité juridique* concluded that, according to Articles 62 and 65 of the Constitution, the New Hebrides could not be part of the *Union française*, but only because the French influence was exercised *parte in qua* and not on the whole territory. *See id.* This "divisibility" is not in conformity with the status of a condominium. *See id.* at 85 n.1.

293. Note that the legal status of the New Hebrides was raised before the French National Court in the New Hebrides in *Nguyen Ngoc Thoa* of 1960 (unreported). *See id.* at 86. In his decision, the French judge doubted whether the condominium could be viewed as a juridical person under French law. *See id.* The matter was referred to the French Ministry of Foreign Affairs, which responded that "the condominium was not a *personnalité morale [de] droit administratif* but it was an international legal person and hence, was competent to appear in court." *Id.* It was found that the condominium existed in international law as a subject of law, with the ability to exercise the rights that the signatory powers had given it. *See id.* at 87. The situation was considered analogous to Morocco's position under French protection. *See id.* This is flatly wrong if we consider the international status of a condominium since in foreign courts, the condominium would obviously shelter under the immunity of the condomini. However, the condomini rightly enquired whether the condominium itself could be sued in the Joint Court. *See id.* This is a question of domestic legal personality and has nothing to do with a putative recognition of international personality.

As a matter of equity, it can be argued that the Protocol should be interpreted so as permitting action against joint services just as British and French nationals are permitted to take action against their own governments. In fact, "les gouvernements français et britannique ont engagé des discussions en vue de modifier le Protocole de 1914 et d'y inclure la reconnaissance de la

If condomini are allowed to *exercise* territorial jurisdiction on the condominial territory, this can only be according to condominial law. As previously noted the community can act through mediate or immediate organs.[294] "The immediate international organ is that designated by the treaty which creates the Condominium, and which exercises the competence of [the community]."[295] In the New Hebrides, this would be the native courts or the Joint Court. "The mediate international organs are those which, consequent upon the duplication of services [*dédoublement fonctionnel*], exercise their competence in the Condominial territory, although they properly belong to each of the [Condomini]."[296] This duplication of services is often needed when a condominium lacks its own organs if the degree of institutionalization is weak. This was the case in Moresnet where "an agreement was reached in 1853 whereby both commissioners were to supervise together the general administration of the police, and whereby they were entitled, in each particular case, to act separately and notably to ask for the help of the Gendarmerie of *their own respective States.*"[297] This case is even stronger in decentralized condominia, where territorial competences are exercised by the condomini *qua* states on a geographical basis. This is clear in the Gastein Convention, already cited, which states as follows:

> The exercise of the Rights acquired in common by the High Contracting Parties, in virtue of Article 3 of the Vienna Treaty of Peace of 30th October, 1864 shall, without prejudice to the continuance of those rights of both Powers to the whole of both Duchies, pass to H.M. the Emperor of Austria as regards

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personnalité juridique du condominium. . . . [Mais] la personnalité reconnue à l'autorité administrative conjointe ne déploiera en principe ses effets que dans l'ordre interne condominial." [the French and the British Governors have entered into talks with a view to modifying the 1914 Protocol, and to including therein the acknowledgement of the legal personality of the condominium. . . . [But] the effects of the personality of the joint administrative authority would in principle only be felt at the internal level of the condominial legal order.] BENOIST, *supra* note 99, at 105-06, 108.

294. *See* O'Connell, *supra* note 2, at 83.

295. *Id.*

296. *Id.*

297. "[E]n 1853, intervint un accord chargeant les deux Commissaires d'exercer de concert l'administration générale de la police et les autorisant à agir, dans chaque cas particulier, séparément et notamment à requérir la gendarmerie *de leur pays respectifs.*" Nicolas Politis, *Condition internationale du territoire de Moresnet-La question des jeux*, 11 R.G.D.I.P. 68, 77 (1904) (emphasis added). The same method was applied to the judicial system. *See infra* Part III(C).

the Duchy of Holstein, and to H.M. the King of Prussia as regards the Duchy of Schleswig.[298]

The situation was slightly different for Germany, as the 1945 Declaration of Berlin[299] delineates that the supreme authority will be exercised in Germany by the French, the American, the British, and the Soviet commanders-in-chief in their respective zones of occupation, and jointly for questions concerning Germany as a whole.[300] One is thus led to the conclusion that only those competences of a zonal interest are exercised by states in their own geographical areas, while questions of pivotal interest continue to be dealt with by the condominial community as such over the whole of Germany. However, it must be emphasized that in the case of a decentralized condominium, the condomini are only entitled by condominial law to *exercise* territorial competences. Territorial jurisdiction, which implies the *enjoyment* of those competences and ultimately the right to dispose of the territory, remains vested in the condominial community.

B. Personal Jurisdiction

Personal jurisdiction is the legal relationship between a state and its nationals. It can be exercised by states over their nationals wherever they are located, that is, in the absence of any territorial link with their national state. Consequently, personal jurisdiction can conflict with the territorial jurisdiction of the state where nationals are located and then usually only concerns the nationals' personal status. Personal jurisdiction is sometimes said to apply over foreigners located on national soil, but in such a case, personal jurisdiction is merely a form of territorial jurisdiction. Since the condominial community is exercising state competences over a territory, it also is vested with personal jurisdiction. The latter affects three categories of persons: the natives, the nationals of the condomini, and the nationals of third states.

Natives can be defined as those persons who are neither the nationals of the condomini nor of any other state and who were born on the condominial territory or were established there at the date of the creation of the condominium. The relationship of the natives to the condominial community is very difficult to characterize. The term "nationality" must

298. Gastien Convention, art. 1, PEACE HANDBOOK NO. 35 GREAT BRITAIN FOREIGN OFFICE 103-05 (1920).

299. Declaration of Berlin, Regarding Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, 68 U.N.T.S. 189, 60 Stat. 1649 (1945).

300. *See* Kelsen, *supra* note 254, at 523.

be rejected from the outset because it has constantly been reserved to identify the link between a state and an individual, a juristic person, or a ship.[301] Nor is it possible to have recourse to relations such as the functional link that exists between an international organization and its agents, for this concept only applies to organizations enjoying international personality.[302] In addition, it is not possible to classify the natives as stateless persons for, when abroad, they are not subject to the mere territorial jurisdiction of the state they are located in, but are entitled to protection by the condomini. And when on the territory of one of the condomini, they are not considered foreigners even though they cannot be assimilated with nationals without violating condominial law. This is well explained by Nicolas Politis with respect to Moresnet, the natives of which were often called "undivided subjects."[303]

> As long as they stay in Moresnet, they certainly cannot be considered Belgians or Prussians . . . . But what is their situation outside the joint territory? Should they be considered foreigners in Belgium and in Prussia, and stateless on the territory of a third State? . . . However, it seems that if they cannot be assimilated to nationals in Belgium and in Prussia, they cannot be considered foreigners either; consequently, they cannot be deported therefrom. Furthermore, it seems logical to admit that on the territory of a third State, they cannot be treated as stateless persons (*Heimatlosen*), for it would seem strange if they could not claim any of the two sovereignties to which they are subject; practically, they should be under the joint protection of the Belgian and the Prussian consuls.[304]

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301. *See Nottebohm (Second Phase)* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

302. *See Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 182 (Advisory Opinion of Apr. 11).

303. Nicolas Politis, *Chronique des Faits Internationaux: Belgique et Prusse — Condition internationale du territoire de Moresnet — La question des jeux*, 11 R.G.D.I.P. 68, 80 (1904).

304.

> Tant qu'ils restent à Moresnet même, il est certain qu'ils ne peuvent être considérés ni comme Belges ni comme Prussiens . . . . Mais quelle est leur condition en dehors du territoire commun? Doivent-ils, en Belgique et en Prusse, être considérés comme des étrangers et, sur le territoire d'un Etat tiers, comme des personnes sans nationalité?. . . On semble cependant disposé à admettre que si, en Belgique et en Prusse, ils ne peuvent pas être assimilés aux nationaux, ils ne peuvent pas non plus y être considérés comme des étrangers; on en conclut qu'ils ne sauraient y faire l'objet d'un arrêté d'expulsion. Il semble logique d'admettre en outre que, sur le territoire d'un Etat tiers, ils ne peuvent pas être traités comme des heimatlosen, car il serait bizarre que, relevant de deux souverainetés, ils ne

The link between the natives and the condominial community is not easy to qualify. It cannot be compared to that applying to natives of a mandate, a trusteeship, a nonself-governing territory, a protectorate, or a territory under international administration. In the first three, there exists a link of a personal nature between the natives and the administering state, a link which is under control of the League of Nations in the case of a mandate, and the United Nations in the case of a trusteeship and a nonself-governing territory. In the case of protectorate, natives keep their former nationality. In a territory under international administration, there exists a juridical link between natives and the United Nations, as in the case of Namibia.[305] The situation is different in the case of a condominium, since "the partial international condominial community enjoys towards the natives of the condominial territory competences identical to that of a State towards its nationals."[306] The exercise of that personal jurisdiction by international organs is not problematic on condominial territory. However, as a consequence of the absence of international personality of the condominial community, there is no way this could be exercised abroad. As a result, it is only by virtue of a special personal link between natives and the condomini that the former can claim a personal status that materializes the exercise of the personal jurisdiction by the condomini.

This link still needs to be exemplified. The 1914 Protocol on the New Hebrides states in Article VIII(3) that "the High Commissioners and Resident Commissioners shall have authority over the native chiefs, [and] they shall have power to make administrative and police regulations binding on the tribes, and to provide for their enforcement."[307] A condominial criminal code also was created. But although the natives owed allegiance to the condominial community, they were deprived of the nationality of either condomini since Article VIII(2) prohibits the natives from acquiring in the Group the status of subject or citizen of either government, or from being under the separate protection of either power.[308]

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pussent se réclamer d'aucune d'elles; pratiquement, ils devraient être sous la protection collective des consuls de Prusse et de Belgique.

Id.

305. On the controverted case of Trieste, *see* André Gervais, *Le statut du territoire libre de Trieste*, 51 R.G.D.I.P. 134-54 (1947).

306. "la communauté internationale partielle condominante jouit à l'égard des autochtones du territoire condominial de compétences identiques à celles d'un Etat à l'égard de ses nationaux." CORET, *supra* note 2, at 253-54.

307. O'Connell, *supra* note 2, at 96.

308. *See id.* at 133-34. Thus, the Article seems to allow natives to acquire the nationality of one of the condomini on its own territory. *See* 1914 Protocol Concerning Condominium in the

For practical reasons, this was not always taken as gospel, and one can envision the exercise of diplomatic protection as being divided between the condomini on a geographical basis.[309] The question was less theoretical in the Sudan, since Article 114 of the Treaty of Sèvres states that natives from the Sudan shall be entitled to British diplomatic and consular protection abroad (hence a recognition by third states of that special personal link is granted). When a condominium over Sudan was genuinely established in 1936, Egypt was also permitted to exercise such protection.[310] Jurisdiction over natives was regulated by a 1900 Criminal Code applicable to any person residing in the Sudan, while civil matters were, for the natives, regulated exclusively by the *Shari'a*, Islamic religious law. A final remark needs to be made with regard to "succession" condominia: "natives" in that case are those nationals of the state, the whole or part of the territory of which was subject to a condominium. One must necessarily come to the conclusion that these people lose their former nationality and become linked to the condominial community with the special personal jurisdiction described above.[311]

New Hebrides, London, B.T.S. 1922, No. 7, cmd. 1681 B.F.S.P. vol. 14 at 212.

309. For jurisdiction purposes, it could be envisioned that the status of protected persons might have been extended to natives of the New Hebrides. This was the case in Great Britain where the British Protectorates, Protected States, and Protected Persons Orders in Council of 1949 and 1958 state in Section 6 that the provisions of the Act shall apply to the New Hebrides and to Canton Island as if they were protected states. This status, though very convenient for practical purposes *not only depends on its recognition by condominial law, but also by third states when natives are not located on Condomini's territories*. The question, however, was never examined in legal theory.

310. Sudan natives were considered British protected persons on British territory as well as abroad, whereas they were assimilated as Egyptian nationals in Egypt, a position that violates condominial law.

311. Coret aptly notes that

> ce qui subsiste, du fait de l'inertie volontaire de la communauté condominante, ce sont les règles qui, antérieurement à la création du condominium, régissaient l'acquisition et la perte de la nationalité de l'Etat dont le territoire a été détaché; mais la persistance de ces règles n'empêche en aucune manière qu'elles ne sont plus utilisées désormais pour acquérir ou perdre la nationalité de cet Etat, mais pour acquérir ou perdre le lien d'allégeance politico-juridique vis-à-vis de la communauté condominante. [as a consequence of the voluntary inactivity of the condominial community, there subsist the rules which, before the creation of the condominium, governed the acquisition and loss of the nationality of the State the territory of which has been separated; however, these rules are henceforth not used to acquire or lose the nationality of that State, but to acquire or lose the legal and political link of allegiance towards the condominial community.]

It is a feature common to all condominia that nationals of the condomini are placed under the personal jurisdiction of their respective state. In fact, it is usually not only personal status that is governed by national law, but also the whole status in civil and criminal matters, as well as in administrative matters.[312] This jurisdiction is characterized by an equality of treatment of the nationals of the condomini on condominial territory. Article I-1 of the 1906 Treaty on the New Hebrides provides that "the subjects of the two Powers would enjoy equal rights of residence, personal protection and trade, and each of the two Powers will retain jurisdiction over its own subjects."[313] The Protocol of 1914 changed " 'retaining *jurisdiction over its subjects*' " to " 'retaining *sovereignty* over its nationals and over corporations legally constituted according to its law.' "[314] Article 20 of the 1914 Protocol drew the consequence of that principle by creating separate national jurisdictions.[315] This principle was also that applied on the Island of the Conference, for the Convention of 27 March 1901 not only sets the principle of the personal jurisdiction of each of the condomini over its respective nationals, but also indicates in Article 2 that " 'the French and the Spaniards are under the jurisdiction of their respective tribunals, as regards the offences they commit on the Island of Faisans.' "[316] On the contrary, it was the practice in Moresnet that Belgian and Prussian tribunals could indifferently be seized by a national of the condomini, while the national continued to be subject to the personal jurisdiction of his or her national state.[317] In Germany, the personal jurisdiction of each of the Allies was maintained, as were civil and criminal jurisdictions, though some economic crimes were punished by condominial organs.[318]

CORET, *supra* note 2, at 268. In Germany, ex-Germans were submitted to a public law status defined by the Control Council for the whole of Germany and by the zonal authorities of the zone where they lived. If abroad, they were considered under the diplomatic protection of the condomini, to the extent that this had been recognised by third states.

312. *See Jabin-Dudognon*, Conseil d'Etat (1938), D.P. III, 1939, at 56.

313. O'Connell, *supra* note 2, at 92. Article 11(5) of the Anglo-Egyptian agreement of 1936 states that "there shall be no discrimination in the Sudan among British subjects and Egyptian nationals with regard to commerce, immigration or acquisition of property." *Id.*

314. *Id.* Hence, French and British juristic persons were assimilated as French or British individuals for jurisdictional purposes. However, in order to avoid conflicts over the determination of such nationality, it was decided in Article I of the Protocol that the criterion would be that of incorporation and not that of *siège réel* as in French law.

315. *See infra* Part III(C).

316. "les Français et les Espagnols pour les infractions commises par eux dans l'île des Faisans, sont justiciables de leurs tribunaux respectifs." CORET, *supra* note 2, at 266.

317. *See id.*

318. *See id.* at 269-70.

However, one cannot so easily claim, as Coret does, that personal jurisdiction is exercised over nationals "exactly in the same conditions as if these nationals had stayed on national territory."[319] For each condomini, personal jurisdiction derives from a title that is granted by condominial law and not by general international law, as is the case for classical personal jurisdiction. Since condominial territory is not national territory, personal jurisdiction on condominial territory derives from a special domestic act. The New Hebrides provides the clearest example. The French jurisdiction derives from a *loi* [law] of July 30, 1900, whereby French citizens in certain Pacific islands are protected by Presidential decrees,[320] and by an *Arrêté* [order] of September 9, 1909, which provides that the publication of French *lois* [laws], décrets [decrees], and *arrêtés* [orders] in the *Journal Officiel de la Nouvelle Calédonie* would make them applicable to French nationals in the New Hebrides.[321] A further *Décret* of 1912 provided that the law applicable in New Caledonia would be applicable to French nationals in the New Hebrides.[322] As a result, some French laws applicable on French metropolitan territory did apply to the New Hebrides.[323] Since the 1906 and 1914 Conventions were implemented in domestic law, they had the same rank as laws pursuant to Article 26 of the 1946 Constitution, and a rank superior to laws according to Article 55 of the 1958 Constitution.[324] The possible conflicts between condominial law and French law as applicable in the New Hebrides were solved according to principles well known to French public lawyers.[325]

The English jurisdiction derives from the Order in Council of 2 November 1907, which incorporated the Pacific Order, 1893, in its application to the New Hebrides.[326] The latter gave the High Commissioner of the Western Pacific's Court jurisdiction to decide cases affecting British citizens in conformity with the substance of the law in England. "The Protocol of 1914 was brought into internal operation in English law by the New Hebrides Order in Council of 1922 which . . .

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319. "exactement dans les mêmes conditions que si ces nationaux étaient demeurés sur le territoire national." *Id.* at 256.

320. *See* O'Connell, *supra* note 2, at 118.

321. *See id.* at 119.

322. *See id.*

323. *See id.*

324. *See id.* at 119-20.

325. *See id.* at 120. In *Guichard*, CA Noumea, (Apr.-May 1961), Recueil Penant, 1961, No. 686, it "was considered that the French Labour Code was applicable in the New Hebrides since it *was not in conflict with any Joint Regulation and was not inconsistent with the Protocol.*" O'Connell, *supra* note 2, at 120-21.

326. *See* O'Connell, *supra* note 2, at 108.

provided that the Protocol would 'have the force of law' and 'be binding upon all persons' within the New Hebrides 'over whom His Majesty shall at any time have jurisdiction.' "[327] For that purpose, the New Hebrides is assimilated to a foreign territory under Her Majesty's jurisdiction and has the same constitutional status as the British Solomon Islands Protectorate, that is, it is protected territory.[328] The 1961 Western Pacific (Courts) Order in Council changed the position of the New Hebrides in English domestic law.[329] Under the Order, the "statutes of general application in force in England on 1st day of January, 1961 [and] the substance of the English common law and doctrines of equity" are applicable to the New Hebrides.[330]

In view of the fact that condomini, whether in the New Hebrides, on the Island of the Conference, or in Moresnet, keep their jurisdiction over their nationals, one is tempted to conclude that it is not only the exercise of that jurisdiction that is delegated to the condomini, but also the enjoyment of that jurisdiction, whether or not one considers that it was originally vested in the community. In fact, it is sensible to conclude that it would be quite logical if the condominial community, as a result of its territorial jurisdiction, exercised some personal jurisdiction over the nationals within the limits of condominial territory. However, due to the lack of a distinct legal personality of the community and its loose institutionalization, each state maintains personal jurisdiction towards its nationals.[331]

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327. *Id.*

328. *See id.* at 109.

329. *See id.* at 110.

330. *Id.* This of course would not prejudice the application to British subjects and optants of Joint Regulations.

331. *See* CORET, *supra* note 2, at 255.

> La logique voudrait que [la communauté condominante], en raison de sa compétences territoriale, exerce une certaine compétence personnelle à l'égard de ces nationaux dans les limites du terrioire condominial. Mais . . . l'absence de personnalité juridique distincte de la communauté et la faible institutionnalisation de cette dernière, va entraîner le maintien de la compétence personnelle de chacun des Etats en cause à l'égard de ses nationaux.

Id. This indeed had a special application in the New Hebrides, for the national public services were not functioning there according to the duplication of services theory, since they were not mediate organs of the community. Rather, they involved not a dual exercise of condominial functions but an exclusive exercise of the functions of organs peculiar to France and Great Britain. It could be argued that the two powers were conceded this competence by the condominial community in whom it was originally vested. However, Coret answers that international competence is always

Nationals of third states are under the personal aspect of the territorial jurisdiction of the condominial community, save for the personal status of those foreigners who according to private international law are regulated by their national state.[332] Under Article 3 of the 1901 Convention on the Island of the Conference, the tribunal competent to hear cases involving foreigners is that of the state exercising the *droit de police au moment de l'infraction* [the right to enforce police rules at the moment the offence occurs],[333] according to the system studied below. If, however, the offence or the tort also involves a French or a Spaniard, the French or Spanish tribunals respectively will be competent.[334] All persons living in the Sudan were subject to the criminal code of 1900 already alluded to.

The most original system was that in the New Hebrides. Article I(3) of the 1906 Convention states that " 'the subjects and citizens of other Powers shall, within the New Hebrides, remain subject to the fullest extent to the laws of their respecting countries.' "[335] However, Article VII of the 1914 Protocol, as amended in 1959, states that "[t]he High Commissioners shall have power to issue jointly, for the maintenance of order and the good government of the Group, and for carrying the present Convention into effect, local regulations, binding on all the inhabitants of the Group without exception."[336] For condominial jurisdiction purposes, Article II of the Protocol created a system of "national assimilation," since nationals of third powers, on arrival in the New Hebrides, had to decide within one month for the British or the French legal systems, either verbally or by written letter to the appropriate Resident Commissioner.[337] This was compulsory, and individuals who did not choose a system were placed under one by a joint decision of the High (Resident) Commissioners.[338]

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a matter of international law, and national competence a matter of constitutional law; and in the New Hebrides the national services did not exercise an international jurisdiction. *See id.*

332. *See id.* at 266.

333. *See id.*

334. *See id.*

335. O'Connell, *supra* note 2, at 93 (quoting Convention Concerning the New Hebrides, art. I(3), London, cmd. 3160, 90 B.F.S.P. 229 [hereinafter 1906 Convention]).

336. *Id.* at 97 (quoting United Kingdom Treaty Series No. 18, cmd. 668 (1959)).

337. *See id.* at 95.

338. *See id.* Once the choice was made, it was final. *See id.* "The intention [was] to treat a Swede, should he opt for the French system, as he would be treated in the law of New Caledonia, and should he opt for the British system, as he would be treated in a British Protectorate." *Id.* Individuals linked to one of the condomini by a special legal relation, such as protected persons or citizens of the Union française, were automatically registered with the relevant Commissioner. Foreign juristic persons were treated according to the same system of assimilation for jurisdictional purposes. Companies created in the Group had to be incorporated according to either French or British law. Also note that the Protocol prohibited the registration of vessels in the New Hebrides

C. *Government and Administration*

According to the famous classification of Rousseau, "the state is a grouping of public services, and has jurisdiction over three competences: the organization, functioning and defense of its public services."[339] Competence to govern and to organize those public services belongs to the condominial community on condominial territory. This is not the case on the international level, such as regarding the defense of public services. Since the administration of a condominium involves fewer theoretical problems than territorial and personal jurisdictions, we shall mention only a few examples and study in more depth the case of the New Hebrides.

The administrative structure of condominia is headed by condominial governments and is ultimately composed of the governments of the condomini. A department of those governments is usually in charge of condominial affairs, for example, the French and Spanish Foreign Ministers for the Island of the Conference, the French Overseas Minister and the Colonial Office for the New Hebrides (but the British Foreign Office for the Sudan), and the Kings of Belgium and Prussia for Moresnet. All central governments are represented on condominial territory by delegates or representatives, and these form the effective condominial organ in charge of the condominium's administration. According to Article 2 of the 1939 Convention on Canton and Enderbury Islands, the United States and Great Britain were represented by "a United States and a British official appointed by their respective Governments."[340] In Moresnet, the condomini were represented by Delegate-Commissioners. In the New Hebrides, Article II of the 1906 Convention provides that each signatory power be represented in the Group by a High Commissioner, assisted by a Resident Commissioner to whom the High Commissioner shall delegate his authority, and who will represent him in the Group during his absence. Regarding Germany, the Declaration of Berlin stated: "The supreme authority . . . will be exercised 'jointly,' 'on instructions from their governments,' by the Soviet, British, United States, and French commanders in chief . . . . 'The four commanders in chief will together constitute the control council. Each commander in chief will be assisted

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other than those that were intended to sail under either the British or the French flag (Article 28). This excluded the natives from seeking the protection of those flags.

339. "[L'Etat est] un groupement de services publics [et] possède à ce titre trois chefs particuliers de compétence: . . . l'organisation, . . . le fonctionnement [et] . . . la défense de ses services publics." ROUSSEAU, *supra* note 97, at 96-97.

340. Reeves, *supra* note 202, at 522.

by a political adviser.'"[341] In the Sudan, however, the supreme condominial organ was composed of one person only. The 1899 Convention stated: "The Supreme military and civil command in the Sudan shall be vested in one officer, termed the 'Governor-General of the Sudan,' [who] shall be appointed by Khedivial Decree on the recommendation of Her Britannic Majesty's Government . . . ."[342] This was unchanged by the 1939 Convention. In Dantzig, the condominial organ was also simple: Sir Tower was appointed High Commissioner.

Public services and administrative organization vary according to the importance of the condominium and the number of its inhabitants. For the Island of the Conference, which has no natives or permanent inhabitants, the 1901 Convention merely stated that the right to enforce police rules would be exercised by France and Spain for alternate six-month periods, the order to be decided by draw.[343] In Germany, there were permanent coordinating committees composed of one representative from each of the four commanders in chief and a control staff organized in several divisions, such as, military, naval, air, transport, political, economic, finance, internal affairs, and legal affairs.[344] Directive No. 10 of September 22, 1945 indicates the acts that the control council was authorized to issue: "proclamations" for acts of pivotal importance, "laws" for general matters, "orders," "directives," and "instructions" of a general or particular interest.[345] As a succession condominium, it is worth noting that the former administrative structures, for example, the *Gemeinde* [municipalities], the *Regierungspräsidenten* [Chief Admininstrators], and the *Landrate* [the administrative heads] were maintained,[346] except for those that were politically oriented, such as the *Gau*.[347] This characteristic also was present in Moresnet, which even though it was a frontier condominium also was a case of state succession to the French Empire. As a result, Moresnet did not have an electoral system but was under the administrative regime enacted in France by the law of *28 pluviôse an VII*.[348] The administration of Moresnet consisted of a mayor, two deputy mayors, and a ten-member

341. Kelsen, *supra* note 254, at 532 (quoting Declaration of Britain, 68 U.N.T.S. 189, 60 Stat. 1649).

342. EL-ERIAN, *supra* note 1, at 164 (quoting 1899 Convention art. 3, B.F.S.P. at 638). In practice, the Governor has always been British.

343. *See* CORET, *supra* note 2, at 265.

344. *See id.* at 289.

345. *Id.* at 289-90.

346. *See id.* at 294.

347. *See id.* Tribal districts and a former Nazi Administrative District.

348. *See* Politis, *supra* note 303, at 78.

town council.[349] The Belgian and Prussian Commissioners acted as prefects, having the same powers that under the law of *an VIII* were given to prefects in towns with under 5000 inhabitants.[350]

In the New Hebrides, it was the Resident Commissioners who were the effective administrators, though they were answerable to the High Commissioners.[351] Condominium matters were placed under joint services.[352] They were dealt with by a separate condominium administrative structure, which was not connected with either the French or the British administration, save for the case of the District Agents and others who were seconded from their national heirarchy.[353] The Resident Commissioners appointed and commanded the condominium officers.[354] Those joint services included posts and telegraphs, public works, ports, buoys and lights, public health, the Joint Court, the Courts of First Instance and Native Courts, joint native prisons, finance, the Land Registry, the service of the administrative districts, the department of survey, the Official Gazette, the police force when the two corps were acting jointly, and all other services that the High Commissioners or Resident Commissioners decided to add.[355]

A major obstacle to the efficiency of the condominium service was the requirement that French and the British appointments to vacant posts be equal.[356] The head of a department had to be of a different nationality than his deputy.[357] For example, the Treasurer was always British and his *Adjoint au chef* always French.[358] Under Article II-3 of the Protocol, the Resident Commissioners, by a joint decision, established administrative districts, with each district having both a British and a French district head.[359] These agents had authority over their respective dependants and

349. *See id.*

350. *See id.* The civil and criminal jurisdiction was exercised in accordance with the choice of the plaintiff, either in the Belgian Tribunal of Verviers, or the Prussian Tribunal at Aix-la-Chapelle; they, however, had to apply French law as it stood before 1816. *See id.* at 77-80. There was no administrative jurisdiction, for the laws of August 16-24, 1790 and *16 fructidor an III* only regulated the jurisdiction for civil and criminal matters. *See id.* at 78.

351. *See* O'Connell, *supra* note 2, at 99.

352. *See id.* at 95.

353. *See id.* at 100.

354. *See id.*

355. *See id.* at 95.

356. *See id.* at 100.

357. *See id.*

358. *See id.*

359. *See id.* at 104.

the natives.[360] Four administrative districts were created by Joint Decision No. 5 of 1965: Port-Villa, Lenakel, Port-Sandwich, and Luganville.[361]

Legislative power over the natives derived from Article VIII-3 of the Protocol.[362] The source of the legislative power of the High Commissioners over nonnatives is Article VII, which stated that "'[t]he High Commissioners [had] the power to issue jointly, for the maintenance of order and the good government of the Group, . . . local regulations, binding on all the inhabitants of the Group without exception, and to enforce [them] by imposing one or more . . . penalties in respect of each offence . . . .'"[363] Daniel O'Connell asks whether the grant of power is to be construed as plenary, or inherently limited.[364] According to O'Connell,

> there are many detailed matters in the Protocol which would be redundant if the High Commissioners had been endowed with plenary powers.
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> . . . Joint Regulations would, on a literal interpretation of the French text, be valid only when enacted for administrative purposes, and would be invalid when they went beyond technicalities and sought to deal with the fundamentals of the social and economic structure.[365]

The authority given to the High Commissioners to delegate their powers to the Resident Commissioners "is not the least of the [Protocol's] curiosities," as it is unclear if the drafters meant the High Commissioners to retain a power of veto over their Resident Commissioners.[366] Joint Standing Order No. 2 of 1956 classified the various Joint instruments as

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360. *See id.*

361. *See id.* at 104 n.4.

362. *See id.* at 96.

363. *Id.* at 97 (quoting Protocol, art. VII, as amended in 1959, Cmnd. 668; United Kingdom Treaty Ser. (1959) No. 18.)

364. *See id.*

365. *Id.* at 98.

366. *Id.* at 101. Until 1964, the British and French governments had attempted by different means to reconcile the necessity of preserving the competence of the High Commissioners with the requirement that their powers be delegated. *See id.* For example, "the French High Commissioner had not properly delegated to the French Resident [Commissioner] the power to make Joint Regulations because he had reserved the right antecedently to approve of these." *Id.* at 101 n.2. The Joint Court held in 1964 that "the common effect of these different approaches was to invalidate the delegation altogether." *Id.* at 101; *see* Hagen v. Public Prosecutor (unreported) and Leeman v. Public Prosecutor (unreported). Note that in French law a delegate is vested with plenary powers to the exclusion of the delegator during the period of delegation. *See* O'Connell, *supra* note 2, at 102.

follows: Regulations (*Règlements*) for texts of general and permanent application, Rules (*Arrêtés*) that specify in more detail the provision of a Regulation, Decisions (*Décisions*) that have a limited application, and Joint Standing Orders (*Instructions*) that regulate the internal organisation of a condominium department.[367]

The most original of the New Hebrides public services was probably the judicial system.[368] Condominial justice was composed of a Joint Court, courts of first instance, and native courts.[369] The Joint Court was made up of a president and a judge, designated by each of the condomini.[370] Although the president had to be of neutral nationality and was appointed by the King of Spain, the presidential functions were soon taken over by the British and French judges acting together.[371] The courts of first instance were composed of both British and French District Agents and an assessor who had deliberative status, while the native courts were directed by either the British or the French District Agents, who presided in alternate months with two assessors providing consultative status.[372] The Joint Court had primary and final jurisdiction in certain civil cases concerning land.[373] Appeals from the native courts were heard by the Joint Court if the monetary value was over £40 in civil cases, as well as appeals from the courts of first instance.[374] Convictions for penal matters from the native court and certain cases from the courts of first instance were reviewed by the Joint Court.[375] The courts of first instance dealt with offences under the Protocol and Joint Regulations.[376] Native courts dealt with criminal cases involving natives only.[377]

Furthermore, the two governments undertook to establish national courts that remained national public services as such, even though their basis was to be found in condominial law.[378] In civil cases, these courts

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367. *See* O'Connell, *supra* note 2, at 102 n.3.
368. *See id.* at 122.
369. *See id.* at 122-23.
370. *See id.* at 124.
371. *See id.*
372. *See id.* at 123.
373. *See id.* at 123 n.1.
374. *See id.*
375. *See id.* Where cases were governed by English and French law, British and French judges presided over the respective Joint Court. *See id.* at 125. Civil cases were governed by the procedure of the country court in England, or of the *justice de paix* in France, and criminal cases, by those of quarter sessions and the *tribunaux correctionnels*, respectively. *See id.* at 126.
376. *See id.* at 125.
377. *See id.* at 126.
378. *See id.* at 127.

had jurisdiction over actions between nonnatives that were not dealt with by the Joint Court, and the question of whether either the British or the French courts were competent was solved by referring to the *lex contractus*, or the national law of the defendant.[379] National courts alone were competent in criminal matters involving nonnatives.[380] The relevant national court had jurisdiction for crimes or offenses when both persons justiciable by the national courts and persons justiciable either by the Joint Court or the native courts were involved.[381] In case both national courts were competent, judgment was first delivered by national courts for persons put under their jurisdiction, then the natives were tried by the Joint Court.[382] One major problem was the law applicable to natives.[383] Under Article VIII-4 of the Protocol, the High Commissioners were to "cause a collection of native laws and customs."[384] These "[were to] be utilized for the preparation of a code of native law, both civil and penal," but only when they were considered not to be contratry to public order and the dictates of humanity.[385] However, there is no indication that a "collection of native laws" had been made to prepare the native criminal code that was enacted in 1927.[386] The latter was revised in 1962, but again it seems to include only French and English jurisprudence.[387] Rules of procedure for native courts in civil and commercial matters were established by the Joint Court in 1951, but they offered no assistance when there was no native civil law.[388] The condominial legal system contained no provisions on torts or contracts between natives; natives were prevented from setting up

379. *See id.*

380. *See id.* The British jurisdiction was exercised by the High Commissioner of the Western Pacific's court until 1961 and then by a High Court of the Western Pacific, the powers of which were those of the High Court of Justice in England. *See id.* at 131. It consisted of two judges, one of them being the British Judge in the Group. *See id.* at 132. Appeals went to the High Court of Appeal of Fiji. *See id.* The French jurisdiction was exercised according to decrees of 1909, which created a special French Tribunal for the New Hebrides, invested with the competence of a "*justice de paix à compétence étendue* and that of a *tribunal criminel*." *Id.* Appeals went to the Court of Appeal of Noumea. *See id.*

381. *See id.* at 127.

382. *See id.*

383. *See id.* at 136.

384. *Id.*

385. *Id.*

386. *Id.*

387. *See id.*

388. *See id.* In native courts, the "general principles of law" were to apply as well as "native customary law." In national courts, when the native was a defendant, the law to be applied was that of the Power of which the nonnative was a dependant, simply because the "law of the defendant" principle could not apply.

companies and registering boats.[389] Births, marriages and death among natives were not officially recorded until 1967.[390]

D. Condominia and the International Legal Order

The absence of international personality prevents the condominium from having an autonomous access to the international legal order.[391] As rightly noted by O'Connell, the subjects of international law also make international law, but territories, just like individuals, can be the addressees of international norms.[392] Condominial territory is such a "passive subject," as Verdross would have stated.[393] A condominium only has mediate relations with the international legal order, that is, through the activities of the condomini.[394] This is well-exemplified by treaty application to condominia, for it is perfectly conceivable for condomini to enter into an agreement that specifically deals with the condominial territory.[395] If the decision to start negotiations is made by the international condominial organs, the negotiations themselves are always undertaken by the condomini *qua* states and not as organs of the condominial community.[396] According to the principle of juridical equality of the condomini, condomini always act collectively when it comes to such negotiations and conclude the agreements in their own names, since the condominium has neither treaty-making capacity nor treaty-making power.[397] Article 11 of the 1936 Treaty on the Sudan provided that, as a

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389. *See id.*
390. *Id.*
391. *See* CORET, *supra* note 2, at 308.
392. *See* O'Connell, *supra* note 2, at 84.
393. *See id.*
394. *See id.* This concept is also well expressed by Cahier:

> Faire l'objet d'une norme juridique est indispensable pour avoir la personnalité juridique mais cela ne suffit pas obligatoirement. Que l'on songe en effet au sort de l'esclave que la loi interdit de tuer, ou à la condition d'un animal qui fait l'objet d'un héritage. Bien que faisant l'objet d'une règle de droit, sera-t-il considéré comme un sujet de droit? [To be the subject of a legal norm is indispensable to legal personality, but this is not necessarily enough. Indeed, one may think of the lot of the slave whom, by law, it is forbidden to kill, or of the condition of an animal which comes into an inheritance. Although they are the addressees of a rule of law, will they be considered subjects of law?].

CAHIER, *supra* note 129, at 21.

395. *See* O'Connell, *supra* note 2, at 88.
396. *See* CORET, *supra* note 2, at 308.
397. *See id.*

general principle, international conventions would only be applicable to the Sudan through joint action of Egypt and Great Britain.[398] In the Annex to the Article, there are special provisions concerning the application to the Sudan of conventions of a technical or humanitarian character.[399] The method chosen was to be that of accession effected by a joint instrument; if accession was not possible, the method was to be chosen by common accord.[400] With regard to the New Hebrides, the condomini sometimes thought of using the colonial application clause of treaties to which they were both parties.[401] This principle was applied for the first time by the Bern Convention on the Universal Postal Union.[402] However, "there ha[d] been no occasion to make treaties especially for the New Hebrides, which ha[d] no local problems with neighboring States[,] . . . and specific application to the New Hebrides of general commitments in the multilateral conventions would only [have] draw[n] international attention to the anomalous situation of the New Hebrides."[403] The colonial application clause was used to extend the application of some treaties to the New Hebrides,[404] but their number is scant. In practice, however, many treaty provisions became applicable to the New Hebrides either by virture of joint regulations or through their adoption into the national law of the condominii.[405] All treaties applicable in New Caledonia, save those excluded upon interpretation, were applicable in the New Hebrides under the French legal system.[406] This was not the case in the British legal system where treaties usually are not transformed into domestic law.[407]

Questions of international responsibility have already been alluded to and do not need much development. The absence of international personality of the condominial community implies that wrongful acts of condominial organs will call for the direct collective responsibility of the condomini as would be the case for a joint organ.[408] In the case of a

398. *See* EL-ERIAN, *supra* note 1, at 189.

399. *See id.*

400. *See id.*

401. *See* CORET, *supra* note 2, at 310-11.

402. *See id.* at 308-09.

403. O'Connell, *supra* note 2, at 88.

404. *E.g.*, the Postal and Telegraphic Conventions, the Convention on Narcotic Drugs, and the World Meteorological Convention (the formula was "'France and United Kingdom . . . for Condominium of the New Hebrides'"). *See* O'Connell, *supra* note 2, at 89 n.2 (citing 209 U.N.T.S. 336 (1953)).

405. *See* O'Connell, supra note 2, at 89.

406. *See id.* at 90.

407. *See id.*

408. *See* CORET, *supra* note 2, at 311-12.

duplication of services, however, it is possible that the responsibility of one single condomini would be engaged, depending on the kind of competence it is exercising and the degree of control over the organ.[409]

A last word needs to be said about the relations between condominia and the international legal order: practice has shown that natives are entitled to the right of self-determination, and for that purpose, they have been assimilated into those peoples to whom this right applies. Indeed, it might be possible to consider natives of condominial territories as peoples under colonial domination,[410] under foreign occupation, or under racist regime.[411] However, since most U.N. Resolutions outside the colonial context refer to the right of self-determination of peoples within a state (we may recall that the condominial territory is a nonstate territory), it seems that the colonial analogy is the best, though one might still invoke a racist aspect (one merely has to remember the gross inequality of treatment between natives and nationals of the condomini in the New Hebrides). On the other hand, the absence of statehood of the condominial territory is an advantage when it comes to the self-determination/secession dilemma, since the condominial territory cannot be considered a territory of the condomini. Self-determination of natives is thus not prejudicial to their territorial integrity.

This right of self-determination was in fact acknowledged by the condomini of the Sudan and the New Hebrides. Article 11(1) of the 1936 Treaty on the Sudan expressly stated that the High Contracting Parties agreed that the well-being of the Sudanese was the principal purpose of their administration in the Sudan. This was in fact interpreted as leading to independence,[412] for the agreement of February 12, 1953 between Egypt and Great Britain recognized the right of the Sudanese people to self-determination as a consequence of the termination of the condominium. During a transitional period, the administration of the Sudan was progressively "sudanized" and representative organs were set up, such as a Parliament of the Sudan, which declared independence on January 1, 1956. For the New Hebrides, it was the U.N. Committee on Colonialism that assured that the condominium would be independent by the end of

409. *See id.* at 312-13.

410. U.N. G.A. Res. 1514 (XV) of 14 December 1960.

411. Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103 of 9 December 1981.

412. *See* CORET, *supra* note 2, at 169. One might find an analogy with the philosophy underlying the administration of non-self-governing territories, which for self-determination purposes indeed were assimilated as colonial countries by the United Nations Special Committee of Twenty-Four.

1980. The situation was complicated, first by the need for agreement between the British government, which had little interest in remaining in the New Hebrides, and the French government, which was resolved to retain New Caledonia and French Polynesia, and second by the lack of consensus between the New Hebridean political parties. At the end of 1978, a "Provisional Government" was set up and "test elections" were held in 1979. The New Hebrides became an independent republic under the name "Vanuatu."[413]

Contrary to what has often been held, condominia are not mere provisory situations that are deemed to degenerate into conflict. Most cases of condominia lasted over a century and a few are still in existence, for example, the Gulf of Fonseca and the Island of Faisans. However, it seems wise to admit that they are abnormal situations. States are usually reluctant to share their domination over territories and peoples, and the setting up of an international condominial community is often the result of a failure to allocate a territory to a single state. As such, a condominium can be seen as a pacific means of dispute settlement — one of many ways to conciliate conflicting claims. In fact, it has too often been associated with situations of armed conflict, especially when it comes to succession condominia. However, one should not forget that the establishment of a condominium in that situation precisely avoids a serious conflict among the vanquishers.

However, the fact that condominia are not mere provisory, dangerous situations, does not imply that they are an *efficient* means of territorial settlement. The concrete analysis of condominia dramatically shows to what cumbersome, and sometimes ridiculous, mechanisms the sacrosanct juridical and functional equality of the condomini has led. Moreover, the establishment of a condominial community has often meant an unacceptable means of foreign domination over natives.

All this obviously shows that the notion of condominium deserves better treatment by legal doctrine, which had superbly neglected it for decades. It seems a little late, however, because condominia, like many other special territorial features, irresistibly evoke situations of the past.

413. For more information on this subject, see James Jupp & Marian Sawer, *The New Hebrides: From Condominium to Independence*, 33 AUSTRALIAN OUTLOOK 15-26 (1979).

IV. ANNEX

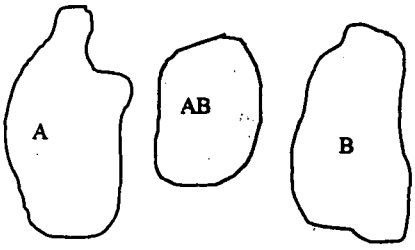


Fig. 1 Condominium on a whole territory between A and B in a colonial situation
ex : the New Hebrides

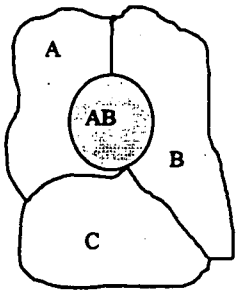


Fig. 2 Condominium on a disputed land frontier between A and B
ex : Moresnet

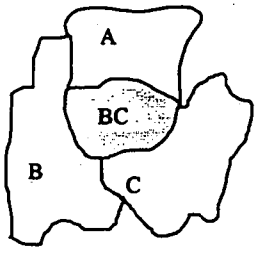


Fig. 3 Condominium on a portion of territory (of A) between B and C as a post-war settlement ('succession condominium')
ex : Schleswig-Holstein Duchies

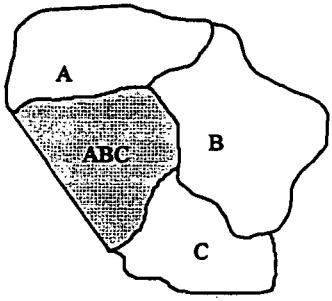
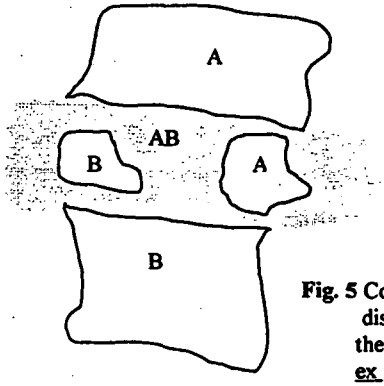


Fig. 4 Condominium on a disputed water frontier between A, B and C: the case of a bay
ex : the Gulf of Fonseca



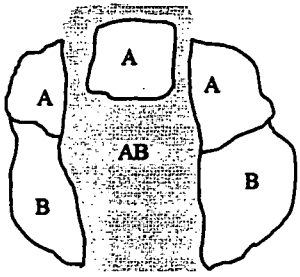


Fig. 5 Condominium on a disputed water frontier between A and B: the case of a river (not affecting the status of isles)
ex : the 'Frontier Streams'

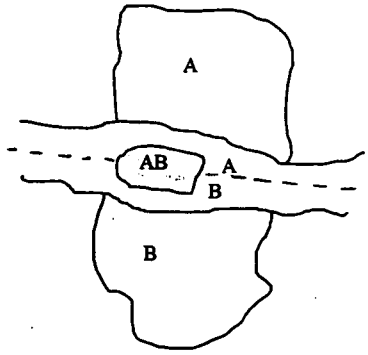


Fig. 6 Condominium on an island between A and B in a frontier river not subject to a condominium
ex : the Island of the Conference

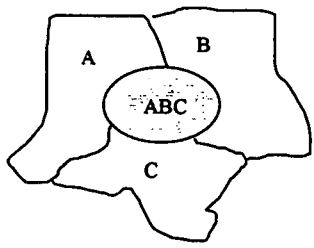


Fig. 7 Condominium on a disputed water frontier between A, B and C : the case of a lake